

United States
Circuit Court of Appeals
For the Ninth Circuit.

GOLD HUNTER MINING & SMELTING COM-
PANY, *Plaintiff in Error,*
VS.
EDWARD JOHNSON, *Defendant in Error.*

Transcript of Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

Filed

United States
Circuit Court of Appeals
For the Ninth Circuit.

GOLD HUNTER MINING & SMELTING COM-
PANY, *Plaintiff in Error,*
vs.
EDWARD JOHNSON, *Defendant in Error.*

Transcript of Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

INDEX.

	Page
Amended Complaint	18
Amendment of Paragraph IX of Defendant's Answer	39
Answer	28
Assignment of Errors.....	195
Bill of Exceptions.....	44
Bond on Writ of Error.....	205
Complaint	7
Citation (Original)	210
Clerk's Certificate	212
Demurrer	17
Journal Entry of Trial.....	42
Judgment	40
Order Allowing Writ of Error.....	204
Petition for Writ of Error.....	194
Praecipe for Transcript.....	207
Return to Writ or Error.....	211
Stipulation	193
Verdict	40
Writ of Error (Original).....	208

Names and Addresses of Attorneys of Record

J. F. AILSHIE, Esq.,

Coeur d'Alene, Idaho;

JAMES A. WAYNE, Esq.,

Wallace, Idaho;

Attorneys for Plaintiff in Error.

JOHN P. GRAY, Esq.,

Coeur d'Alene, Idaho;

WALTER H. HANSON, Esq.,

Wallace, Idaho;

Attorneys for Defendant in Error.

COMPLAINT.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, *Plaintiff,*

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, a Corporation, *Defendant.*

COMPLAINT.

The plaintiff complains and alleges:

I.

That the plaintiff is now and at all the times hereinafter mentioned was a bona fide resident and citizen of the State of Idaho, residing at Mullan, in the County of Shoshone, in said State.

II.

That the defendant is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul, Ramsey County, Minnesota, and is now and at all of the times hereinafter mentioned was a citizen of the State of Minnesota. That the said defendant corporation has heretofore complied with all of the laws of the State of Idaho relating to foreign corporations doing business therein, and that it has filed its articles of incorporation in the office of the County Recorder of Shoshone County, Idaho, which said County of Shoshone has been

designated as the county in which its principal place of business in the State of Idaho is established, and in the office of the Secretary of State of the State of Idaho and has designated an agent upon whom service of process issued under the laws of this State may be served, namely, one Charles W. Beale, of Wallace, Shoshone County, Idaho. That said defendant has been for a long time last past and on the 17th of October, 1914, was engaged in operating a certain mining property, situated in Hunter Mining District, County of Shoshone, State of Idaho.

III.

That upon the 17th day of October, 1914, and prior thereto, the plaintiff was in the employ of the defendant as machineman, engaged in working in its mine near Mullan, in Hunter Mining District, Shoshone County, Idaho.

IV.

That the plaintiff was working on the 400-foot level, so-called, of the defendant's mine, and that the accident to plaintiff hereinafter described occurred while the plaintiff was on night shift on the 17th day of October, 1914. That the plaintiff went to work on the night shift of said day about five o'clock in the afternoon and went to the place where he had been directed to work by the shift boss of the defendant on the 400-foot level. That in operating the machine drill which had been furnished to the plaintiff by the defendant, and which it was the plaintiff's duty to operate, the plaintiff found that the said drill was out of repair and in bad order,

and it thereupon became the duty of the plaintiff under instructions theretofore received from the defendant when his said Hammer drill became out of order, to take the said drill down and to carry it to the level and along the level to the shaft and thence to the main station in the mine on a higher level and exchange it for another drill.

V.

That the plaintiff was working upon what was known as the fourth floor above the 400 level and towards the west end of said floor in said stope; that working with plaintiff was another man, a mucker, by the name of Holme; that the said floors are numbered upward from the level and in order to reach the shaft it was necessary to go down from one floor to the other of the said 400 level. That man-ways had been at some time previously provided and constructed for reaching the floors above the said 400 level and that along said man-ways, and for the purpose of permitting the employees of the defendant to go from the level to the floors above ladders were constructed and installed; that in the said stope there were two man-ways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, the other one extended from the 400 level toward the easterly end thereof up to the fourth floor. That the man-way in the westerly end of the said stope had not been extended to the fourth floor, and because of a large chute extending from the third floor down to the 400 level, and a slide chute from the bottom

of the third floor to the fourth floor which covered the width of the floors, and because of the opening at the top of the said chute on the floor of the third floor and a large broken floor area around the same it was impossible for the plaintiff from the place where he was working, to reach the man-way in the westerly portion of said stope, and the only way to reach the said 400 level was downward in the easterly end of the stope and east of the said large chute. That the stope on the said fourth, and on the third, and on the floors below had been extended somewhat easterly from the said man-way and the face of the solid ground on the east extended somewhat beyond the timbering on said floors. That the ordinary method of going from the fourth floor down to the said 400 level would be by the said man-way in the easterly end of said stope. That the plaintiff, after taking down his machine, took said machine over to the said man-way and down from the fourth floor to the third floor by the said ladder; that the ladder from the second floor to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff, not to exceed two or three days, and at the time of the accident to plaintiff had not been repaired or replaced by the defendant and there was not means of going by the said man-way from the said third to the said second floor; that the only way of going from the third floor to the second floor in said east end of the stope was by way of a plank or lagging eight inches in width which had been laid by the defendant from the said floor at the easterly end thereof and over to the

solid face of the stope, and walking along the said plank from the said third floor to the face of the stope and in an easterly direction, and then back in a westerly direction along the slope of the face of the stope to the said second floor; that the said lagging was simply an eight-inch plank laid from the said third floor over to the said face of the stope and was inclined downward from the third floor at an angle toward the face; the said lagging was unsecure, was not nailed or wedged and no rails were constructed along the sides thereof and no guards whatever provided, or rope or other hand pole provided. That beneath the said lagging or plank the second floor had not been timbered out to the solid ground but there was an opening from the said lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor; that the plaintiff, having no other way provided by the defendant, proceeded along the said third floor to the said lagging or plank, and while walking on the same and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, the plaintiff either slipped from the said lagging, or the said lagging turned slightly, throwing the plaintiff off of the same and downward approximately 20 feet to the said first floor with the said heavy steel drill falling on top of the plaintiff and across his back. That there was some dripping of water in the said mine in the face of the stope and the said lagging had been permitted by the defendant to become somewhat wet, moist and slippery; that as a result of the said fall

this plaintiff was injured as hereinafter more particularly set forth.

VI.

That the shift boss of the defendant company in charge of the said stope and in charge of this plaintiff was one Steve Shaw; that it was the duty of this plaintiff to perform such work, and at such place and in such manner as the said Steve Shaw directed. That the said shift boss had under his charge other employes of the defendant including timbermen and miners and muckers; that one of the duties of said shift boss was to cause such repairs to be made as were necessary to keep and maintain the places where the employes of the defendant were required to work in a reasonable, safe condition and to make such inspections as were reasonable and necessary in the performance of the business of the defendant. That on the shift before that upon which the plaintiff was injured this plaintiff called the attention of the said shift boss, Steve Shaw, to the fact that the said ladder above referred to, between the second and third floors, had been broken and that it was necessary to repair the same; that the said shift boss thereupon stated to this plaintiff and promised this plaintiff that he would cause the same to be repaired and replaced and that he would speak also to the foreman of the mine about it and that it would be replaced and repaired, and gave to this plaintiff assurance to that effect, and the said shift boss stated to plaintiff that he should use the way which the plaintiff was going at the time of his

injury until the said ladder was replaced and the man-way repaired. That the plaintiff, relying upon the said promise of the said shift boss of the said defendant to repair the said man-way and to replace the said ladder, continued in the employ of the defendant up to the time of his injury.

That it was no part of the duty of this plaintiff to repair any such ladder or to replace the same, and the repair of the same would not have been within the scope of the plaintiff's employment or duties.

VII.

Plaintiff further alleges that the defendant was negligent and careless in leaving the said openings beneath the said plank and way untimbered and insecure, and plaintiff alleges that the said way which this plaintiff was required to go was insufficiently and inadequately protected and timbered. That the said defendant negligently, carelessly and wrongfully failed and neglected to discharge its duties to this plaintiff as its employee in the respects hereinbefore set forth.

VIII.

Plaintiff further alleges that the said defendant had full and express knowledge of the condition of said man-way and the said way which the plaintiff was required to go at the time of his injury, and of the fact that said way so provided was unsafe and insecure. Plaintiff further alleges that it would have required but a very short time to have constructed a ladder to extend from the said second floor to the

third floor, and to have nailed the same up, or secured the same in some proper manner.

IX.

Plaintiff further alleges that the said defendant owed to the plaintiff the duty to furnish a reasonably safe place in which to go to and from his work and from the place where he was working to the place where he could exchange his said machine; that the defendant was negligent and careless in furnishing said unsafe way and in not replacing the said ladder after the same had been called to its attention and permit the said man-way to become so out of repair as to be impassible for this plaintiff.

X.

Plaintiff alleges that prior to the 17th day of October, 1914, the plaintiff was a strong, able-bodied, healthy man of the age of 33 years with a life of expectancy of over 33 years, was in the possession of all his faculties, a competent laborer capable of earning Four Dollars (\$4.00) per day; that the plaintiff was a shaft miner and during a large part of the year was employed at Four Dollars (\$4.00) per day and always earned Three and 50-100 Dollars (\$3.50) per day and in excess thereof.

XI.

That because of the negligence and carelessness of the defendant as hereinbefore stated, and without fault or negligence on the part of the plaintiff the said plaintiff was injured as hereinbefore stat-

ed, was crushed and bruised and sustained a severe contusion of the muscles and an injury to the ligaments of the right sacro-iliac joint and the muscles and ligaments of the lower part of the spinal column and in and about the same, and the said plaintiff became bruised and wounded in his back and has been for a long time weak and sore, during which time he has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer therefrom and will continue to suffer therefrom during the remainder of the plaintiff's life. That the plaintiff has been rendered a cripple and has at all times since said injury suffered great and severe pain; that his nerves have been affected and his entire nervous system shocked and injured and the nerves of his limbs have been affected. That in addition to the right side being particularly weak and disabled plaintiff has also suffered an injury to the left side of his back, both his right and left leg have become weak and the nerves thereof permanently affected until the said both legs and the muscles thereof are weak and the normal functions of his said legs have been permanently injured and affected. That as a result of said injuries his entire nervous system has been severely shocked and particularly the nerves in and about the said joint and extending into his legs. That the said plaintiff is weak and has been unable to do or perform any labor since said injury.

That the said wounds so wrongfully, unlawfully, negligently and carelessly inflicted upon the plaintiff by the defendant and the said injuries resulting

therefrom are permanent and have and will permanently disable the plaintiff and prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury.

XII.

That by reason of the matters and things hereinbefore alleged and by reason of the injuries, wounds and bruises suffered by the plaintiff, and by reason of the permanent character and nature thereof and the disabilities caused to the plaintiff by the said defendant as herein alleged, and by reason of the injury to the said joint and the muscles and ligaments in and about the right sacro-iliac joint and the muscles and ligaments of the lower part of the spinal column, and by reason of the pain heretofore caused to the plaintiff and which the plaintiff will hereafter continue to suffer, and because of the permanency of said injuries and their effect upon the plaintiff's ability to perform manual labor and to earn a living the plaintiff has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the said defendant for the sum of Thirty Thousand (\$30,000.00) Dollars and for his costs and disbursements herein expended.

JOHN P. GRAY,
Coeur d'Alene, Idaho;
WALTER H. HANSON,
Wallace, Idaho,
Attorneys for Plaintiff.

State of Idaho,
County of Shoshone,—ss.

Edward Johnson, being first duly sworn, on his oath deposes and says:

That he is the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

EDWARD JOHNSON.

Subscribed and sworn to before me this 3rd day of April, A. D. 1915.

(N. P. Seal.)

THERRETT TOWLES,

Notary Public.

Endorsed: Filed April 5, 1915. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.

DEMURRER.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, a Corporation, Defendant.

Demurrer.

Comes now the defendant and demurs to plaintiff's complaint herein and for grounds of demurrer alleges:

That the said complaint does not state facts sufficient to constitute a cause of action.

JAMES A. WAYNE,

Attorney for Defendant,

Residence and postoffice address, Wallace, Idaho.

Endorsed: Filed April 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

AMENDED COMPLAINT.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, a Corporation, Defendant.

Amended Complaint.

The plaintiff files this his amended complaint and alleges:

I.

That the plaintiff is now and at all the times hereinafter mention was a bona fide resident and citizen of the State of Idaho, residing at Mullan, in the County of Shoshone, in said State.

II.

That the defendant is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul, Ramsey County, Minnesota, and is now and at all of the times hereinafter mentioned was a citizen of the State of Minnesota. That the said defendant corporation has heretofore complied with all the laws of the State of Idaho, relating to foreign corporations doing business therein, and

that it has filed its articles of incorporation in the office of the County Recorder of Shoshone County, Idaho, which said County of Shoshone has been designated as the county in which its principal place of business in the State of Idaho is established, and in the office of the Secretary of State of the State of Idaho and has designated an agent upon whom service of process issued under the laws of this State may be served, namely, one Charles W. Beale, of Wallace, Shoshone County, Idaho. That said defendant has been for a long time last past and on the 17th day of October, 1914, was engaged in operating a certain mining property, situated in Hunter Mining District, County of Shoshone, State of Idaho.

III.

That upon the 17th day of October, 1914, and prior thereto, the plaintiff was in the employ of the defendant as machineman, engaged in working in its mine near Mullan, in Hunter Mining District, Shoshone County, Idaho.

IV.

That the plaintiff was working on the 400-foot level, so-called, of the defendant's mine, and that the accident to plaintiff hereinafter described occurred while the plaintiff was on night shift on the 17th day of October, 1914. That the plaintiff went to work on the night shift of said day about five o'clock in the afternoon and went to the place where he had under instructions theretofore received from the de-

fendant on the 400-foot level. That in operating the machine drill which had been furnished to the plaintiff by the defendant, and which it was the plaintiff's duty to operate, the plaintiff found that the said drill was out of repair and in bad order, and it thereupon became the duty of the plaintiff under instructions theretofore received from the defendant when his said Hammer drill became out of order, to take the said drill down and to carry it to the level and along the level to the shaft and thence to the main station in the mine on the higher level and exchange it for another drill.

V.

That the plaintiff was working upon what was known as the 4th floor above the 400 level and toward the West end of said floor in said stope; that working with plaintiff was another man, a mucker by the name of Holme; that the said floors are numbered upward from the level and in order to reach the shaft it was necessary to go down from one floor to the other of the said 400 level. That man-ways had been at some time previously provided and constructed for reaching the floors above the said 400 level and that along said man-ways, and for the purpose of permitting the employees of the defendant to go from the level to the floors above ladders were constructed and installed; that in the said stope there were two man-ways, one of which extended from the 400 level in the westerly end of the stope upward to the third floor, and the other one extended from the 400 level toward the easterly end thereof up-

ward to the fourth floor. That the man-way in the westerly end of the said stope had not been extended to the fourth floor, and because of a large chute extending from the third floor down to the 400 level, and a slide chute from the bottom of the third floor to the fourth floor which covered the width of the floors, and because of the opening at the top of the said chute on the floor, of the third floor and a large broken floor area around the same it was impossible for the plaintiff from the place where he was working, to reach the man-way in the westerly portion of said stope, and the only way to reach the said 400 level was downward in the easterly end of the stope and east of the said large chute. That the said stope on the said fourth, and on the third, and on the floors below had been extended somewhat easterly from the said man-way and the fact of the solid ground on the East extended somewhat beyond the timbering on said floors. That the ordinary method of going from the fourth floor down to the said 400 level would be by the said manway in the easterly end of said stope. That the plaintiff after taking down his machine, took said machine over to the said man-way and down from the fourth floor to the third floor by the said ladder; that the ladder from the second floor to the third floor had been broken by a fall of rock a short time before the accident to the plaintiff; not to exceed two or three days, and at the time of the accident to plaintiff had not been repaired or replaced by the defendant and there was not means of going by the said man-way from the

said third to the said second floor; that the only way of going from the third floor to the second floor in said east end of the stope was by way of a plank or lagging eight inches in width which had been laid by the defendant from the said floor at the easterly end thereof and over to the solid face of the stope and walking along the said plank from the said third floor to the face of the stope and in an easterly direction, and then back in a westerly direction along the slope of the face of the stope to the said second floor; that the said lagging was simply an eight inch plank laid from the said third floor over to the said face of the stope and was inclined downward from the third floor at an angle toward the face; the said lagging was insecure, was not nailed or wedged and no rails were constructed along the sides thereof and no guards whatever provided, or rope or other hand hole provided. That beneath the said lagging or plank the second floor had not been timbered out to the solid ground but there was an opening from the said lagging or plank downward to the first floor or to the solid ground which constituted the face of the stope on the first floor; that the plaintiff having no other way provided by the defendant, proceeded along the said third floor to the said lagging, or plank, and while walking on the same and because of the negligence and carelessness of the defendant in providing such unsafe, inadequate way, the plaintiff either slipped from the said lagging, or the said lagging, turned slightly, throwing the plaintiff off of the same and downward approximately 20 feet to the

said first floor with the said heavy steel drill falling on top of the plaintiff and across his back. That there was some dripping of water in the said mine in the face of the stope and the said lagging had been permitted by the defendant to become somewhat wet, moist and slippery; that as a result of the said fall this plaintiff was injured as hereinafter more particularly set forth.

VI.

That the shift boss of the defendant company in charge of the said stope and in charge of this plaintiff was one Steve Shaw; that it was the duty of this plaintiff to perform such work, and at such place and in such manner as the said Steve Shaw directed. That the said shift boss had under his charge other employes of the defendant including timbermen and miners and muckers; that one of the duties of said shift boss was to cause such repairs to be made as were necessary to keep and maintain the places where the employes of the defendant were required to work in a reasonably safe condition and to make such inspections as were reasonable and necessary in the performance of the business of the defendant. That on the shift before that upon which the plaintiff was injured this plaintiff called the attention of the said shift boss, Steve Shaw, to the fact that the said ladder above referred to, between the second and the third floors, had been broken and that it was necessary to repair the same; that the said shift boss thereupon stated to this plaintiff and promised this plaintiff that he would cause the same

to be repaired and replaced and that he would speak also to the foreman of the mine about it and that it would be replaced and repaired, and gave to this plaintiff assurance to that effect, and the said shift boss stated to plaintiff that he should use the way which the plaintiff was going at the time of his injury until the said ladder was replaced and the man-way repaired. That the plaintiff, relying upon the said promise of the said shift boss of the said defendant to repair the said man-way and to replace the said ladder continued in the employ of the defendant upon the time of his injury.

That it was no part of the duty of this plaintiff to repair any such ladder or to replace the same, and the repair of the same would not have been within the scope of the plaintiff's employment or duties.

VII.

Plaintiff further alleges that the defendant was negligent and careless in leaving the said opening beneath the said plank and way untimbered and insecure, and plaintiff alleges that the said way which this plaintiff was required to go was insufficiently and inadequately protected and timbered. That the said defendant negligently, carelessly and wrongfully failed and neglected to discharge its duties to this plaintiff and its employees in the respects hereinbefore set forth.

VIII.

Plaintiff further alleges that the said defendant had full and express knowledge of the conditions of

said man-ways and the said way which the plaintiff was required to go at the time of his injury, and of the fact that said way so provided was unsafe and insecure. Plaintiff further alleges that it would have required but a very short time to have constructed a ladder to extend from the said second floor to the third floor, and to have nailed the same up, or secured the same in some proper manner.

IX.

Plaintiff further alleges that the said defendant owed to the plaintiff the duty to furnish a reasonably safe place in which to go to and from his work and from the place where he was working to the place where he could exchange his said machine; that the defendant was negligent and careless in furnishing said unsafe way and in not replacing the said ladder after the same had been called to its attention and permit the said man-way to become so out of repair as to be impassable for this plaintiff.

X.

Plaintiff alleges that prior to the 17th day of October, 1914, the plaintiff was a strong, ablebodied, healthy man of the age of 33 years with a life of expectancy of over 33 years, was in the possession of all his faculties, a competent laborer, capable of earning Four Dollars (\$4.00) per day; that the plaintiff was a shaft miner and during a large part of the year was employed at Four Dollars (\$4.00) per day and always earned Three and 50-100 Dollars (\$3.50) per day and in excess thereof.

XI.

That because of the negligence and carelessness of the defendant as hereinbefore set forth, and without fault or negligence on the part of said plaintiff, the said plaintiff was injured, crushed and bruised.

That plaintiff suffered a concussion of the brain and spinal cord, a bruising and contusion of the muscles of the back, an injury to the ligaments of both sacro-iliac joints and the ligaments of the lower part of the spinal column and in and about the same. A bruising and contusion of the chest with injury to the pleura and lungs, and a fracture dislocation of the coccyx.

That as a result of said injuries he has since the date of said injuries suffered great physical pain and mental anguish and will continue to suffer therefrom during the remainder of his life.

That as a further result of said injuries he has been rendered completely impotent since the date of injury and will continue to remain impotent during the remainder of his life.

That as a further result of said injury his arms and legs have been greatly weakened and the muscles thereof are in a constant state of twitching, rendering work difficult and uncertain, and definite actions of the hands uncertain.

That the plaintiff, ever since said injuries, has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer from said injuries and will continue to suffer

during the remainder of said plaintiff's life. That the plaintiff has been rendered a cripple and his entire nervous system shocked and injured and the plaintiff has been unable to do or perform any labor since said injury, and as a result thereof will be unable to do or perform any labor in the future.

That the said wounds so wrongfully, unlawfully, negligently and carelessly inflicted upon the plaintiff by the defendant, are permanent and have and will permanently disable the plaintiff and prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury.

XII.

That by reason of the matters hereinbefore alleged and by reason of the injuries, wounds and bruises suffered by the plaintiff, and by reason of the permanent character and nature thereof, and the disabilities caused to the plaintiff thereby, and because of the pains and anguish suffered, plaintiff has been damaged in the sum of Thirty Thousand Dollars. (\$30,000).

WHEREFORE plaintiff prays judgment against the said defendant for the sum of Thirty Thousand Dollars (\$30,000) and for his costs and disbursements herein expended.

JOHN P. GRAY,

Coeur d'Alene, Idaho.

WALTER H. HANSON,

Wallace, Idaho,

Attorneys for Plaintiff.

State of Idaho,
County of Shoshone—ss.

Edward Johnson, being first duly sworn, on his oath, deposes and says:

That he is the plaintiff above named; That he has read the foregoing amended complaint and knows the content thereof and that he believes the facts therein stated to be true.

EDWARD JOHNSON.

Subscribed and sworn to before me this 24th day of April, A. D. 1915.

HERMAN J. ROSSI,

Notary Public.

Endorsed: Filed April 27, 1915. A. L. Richardson, Clerk. By L. M. Larson, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff.

vs.

GOLD HUNTER MINING & SMELTING
COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant above named and for answer to plaintiff's amended complaint herein admits, denies and qualifies and alleges as follows:

I.

Defendant admits the allegations contained in paragraphs I, II and III of said amended complaint.

II.

Answering paragraph IV of said amended complaint defendant denies that the drill furnished plaintiff was out of repair, or was in bad order, and denies that it became the duty of the plaintiff under instructions received from the defendant, or otherwise, or that it was necessary for plaintiff to take said drill down, or to carry it to the level and along the level to the shaft and thence to the main station and exchange it for another drill, and defendant alleges that in truth and in fact said drill was in good condition and did not require any repairs whatsoever, and that it was not necessary at any time on said night of October 17th, 1914, for the plaintiff to exchange said drill for another, and denies that it was necessary for plaintiff to leave his place of work on the fourth floor of said 400 foot level at any time during said night of October 17th, 1914.

III.

Answering paragraph V. of said amended complaint defendant denies that because of a large chute, or any chute whatsoever, extending from the third floor down to the 400 foot level or elsewhere, or because of a slide chute from the bottom of the third floor to the fourth floor which covered the width of said floors, or because of the opening at the top of the said chute on the floor of the third floor, or because of a large broken floor area around the same, or for any of said causes or reasons, or for any reason whatsoever, it was impossible for the plaintiff from the place where he was working to reach the

man-way in the westerly portion of said stope, and alleges that in truth and in fact it was not only possible but was the only proper way for plaintiff to descend to the 400 foot level from the fourth floor; defendant denies that the only way to reach the said 400 foot level was downward in the easterly end of the stope and east of the said chute, and alleges that in truth and in fact the proper way to descend from the place where plaintiff was at work to the 400 foot level was down the man-way in the easterly portion of said stope to the third floor and thence in a westerly direction to the man-way at the westerly end of said stope and thence down said westerly man-way to the 400 foot level; and defendant further alleges that there was ample space and room for the plaintiff to walk past said chute and slide on the third floor, in walking from the east man-way to the west man-way and that said west man-way was provided with good, sufficient and proper ladders from said third floor downward to the 400 foot level; defendant denies that the ordinary method of going from the third floor down to the said 400 foot level was by the said man-way in the easterly end of said stope; defendant denies that the plank mentioned in said amended complaint, or any plank, had been laid by the defendant from the third floor to the face of said stope, or elsewhere; denies that in going from said third floor to said second floor it was necessary or proper for the plaintiff to walk along the said plank, or any plank from the third floor to the face of the stope in an easterly direction or otherwise, and then

back in a westerly direction along the slope of the face of said stope to the second floor and alleges that the proper way for the defendant to descend from the said third floor to the said second floor, upon finding the ladder broken in said easterly man-way from the third floor to the second floor, was by means of the ladder in the man-way at the westerly end of said stope, and not otherwise; defendant denies that an eight inch plank, or any plank, or lagging, whatsoever, had been laid by it, or by its direction, from the third floor to the face of the stope as a means of descending from said third floor to said second floor; defendant admits that some of the workmen on said 400 foot level, without the knowledge or consent of this defendant, had placed a lagging from the third floor to the face of said stope, claiming that it was easier to descend upon said plank than by means of the ladder by it provided, especially when carrying any weighty article; defendant denies that it had not provided plaintiff with any way for descending from said third floor to said second floor other than by means of said lagging, or plank; denies that it negligently or carelessly, or in any manner failed to provide a safe and adequate way for the plaintiff to descend from said third to said second floor, and alleges that in truth and in fact the said plaintiff, having safely reached the third floor as alleged in said amended complaint, could have safely descended from said third floor to said second floor by walking in a westerly direction upon said third floor for a distance of about thirty-five feet to the man-way

in the westerly end of said stope and thence down said man-way to the sill floor; defendant denies that the said lagging or plank had been permitted by the defendant, or by any one to become wet or moist or slippery and denies that said lagging was at the time of the said accident to the plaintiff wet, moist or slippery.

IV.

Answering paragraph VI. of said amended complaint this defendant denies that on the shift before the accident to the plaintiff, or at any time, or at all, the said plaintiff called the attention of the shift boss to the fact that the ladder between the second and third floor had been broken, or that it was necessary to repair the same; denies that said shift boss stated to plaintiff, or promised plaintiff that he would cause said ladder to be repaired or replaced, or that he would speak to the foreman of the mine about it, or that said ladder would be replaced or repaired, or gave plaintiff assurance to that effect, and denies that said shift boss stated to plaintiff that plaintiff should use the way which plaintiff used at the time of his said injury until the said ladder was replaced, or said man-way repaired; denies that plaintiff relied upon any promise of said shift boss to repair said man-way or to replace said ladder, or that plaintiff continued in the employ of defendant under any promise of said shift boss whatsoever.

V.

Answering paragraph VII. of said amended complaint defendant denies that it negligently or care-

lessly left any openings beneath the said plank and way untimbered or insecure, and denies that plaintiff was required to descend by means of said plank and denies that said way was insufficiently or inadequately protected or timbered; denies that defendant negligently or carelessly or wrongfully, or at all, failed or neglected to discharge its duties to the plaintiff, or its employees in any respect whatsoever.

VI.

Answering paragraph VIII. of said amended complaint, defendant denies that it ever had express knowledge, or any knowledge whatsoever of the way that plaintiff was required to descend from the third floor to the second floor by means of said plank or lagging and denies that said plaintiff was required so to descend, and denies that defendant ever had any knowledge that the way provided by it for descending from said third floor to said second floor was unsafe or insecure, and denies that said way was unsafe or insecure.

VII.

Answering paragraph IX of said amended complaint defendant denies that it was negligent or careless in furnishing an unsafe way, or in not replacing the said ladder, and denies that it did furnish plaintiff an unsafe way.

VIII.

Answering paragraph X. of said amended complaint, this defendant alleges that as to whether plaintiff was 33 years of age at the time of said ac-

cident, or as to how old plaintiff was at said time, this defendant has no knowledge or belief upon said subject sufficient to enable it to answer said allegations of said complaint and it therefore denies the same upon that ground.

IX.

Answering paragraph XI. of said amended complaint this defendant denies that plaintiff was injured or crushed or bruised or suffered any injuries whatsoever by reason of any negligence or carelessness of the defendant, and alleges that if the said plaintiff suffered any injuries by the accident set forth in said amended complaint that said injuries were suffered by reason of the carelessness and negligence of the plaintiff himself.

That as to whether the plaintiff suffered a concussion of the brain and spinal cord, a bruising and contusion of the muscles of the back, an injury to the ligaments of both sacro-illac joints and the ligaments, of the lower part of the spinal column and in and about the same; a bruising and contusion of the chest with injury to the pleura and lungs, and a fracture dislocation of the cocyx; and as to whether as a result of said injuries he has since the date of said injuries suffered great physical pain and mental anguish and will continue to suffer therefrom during the remainder of his life; and as to whether as a further result of said injuries he has been rendered completely impotent since the date of injury and will continue to remain impotent during the remainder of his life; and as to whether as a further result of said

injury his arms and legs have been greatly weakened and the muscles thereof are in a constant state of twitching, rendering work difficult, and uncertain, and definite actions of the hands uncertain; and as to whether the plaintiff, ever since the said injuries, has suffered tormenting pains and endured great mental and physical pain and anguish, and has continued to suffer from said injuries and will continue to suffer during the remainder of said plaintiff's life; and as to whether the plaintiff has been rendered a cripple and his entire nervous system shocked and injured and the plaintiff has been unable to do or perform any labor since said injury, and as a result thereof will be unable to do or perform any labor in the future, this defendant has no knowledge or belief upon said subject sufficient to enable it to answer said allegations of said complaint and it therefore denies said allegations upon that ground.

That as to whether said wounds are permanent or will permanently disable the plaintiff or prevent the plaintiff from performing manual labor or attending to any business which he was capable of performing prior to his injury, this defendant has no knowledge or information upon the subject sufficient to enable it to answer said allegations of said complaint, and it therefore denies the same upon that ground.

X.

Defendant denies that by reason of any injury, wounds or bruises suffered by the plaintiff, or by reason of the permanent character or nature thereof, or by reason of disabilities caused to plaintiff there-

by, or because of the permanency thereof, or their effect upon the plaintiff's ability to perform manual labor and to earn a living, or because of the pains and anguish suffered, or in any manner whatsoever, the plaintiff has been damaged in the sum of \$30,000.

XI.

Further answering said amended complaint and as a first affirmative defense thereto this defendant alleges: That if the plaintiff was injured at the time and place alleged in the amended complaint herein, that said injury was brought about and occasioned solely and entirely because of the carelessness and negligence of said plaintiff in not using due care and caution in respect to his work and in going from the third floor to the second floor of said stope, by means of said plank instead of going in a westerly direction on said third floor to the man-way at the westerly end of said stope and thence downward to said second floor, and not because of the carelessness or negligence or lack of due and reasonable care or caution on the part of the defendant, or on the part of any one for whom it is responsible.

XII.

Further answering said amended complaint, and as a second affirmative defense thereto: This defendant alleges that if the plaintiff was injured at the time and place alleged in his complaint, and said injury was not caused and brought about by his own carelessness and negligence it was brought about and occasioned by the carelessness and negligence of a

fellow servant of said plaintiff, and not in any degree because of the carelessness or negligence of the defendant, or the carelessness or negligence or lack of due care and caution on the part of any one for whom it is responsible.

XIII.

Further answering said amended complaint and as a third affirmative defense thereto, this defendant alleges that in entering into the employ of the defendant, it was part of the consideration for such employment and the plaintiff agreed thereto, that all risks, dangers and damages which were or might be sustained by said plaintiff in pursuing such employment as he was engaged in at the time of his injury, as alleged in the complaint were assumed by said plaintiff and that for such injury, risk or damage neither the defendant, nor any one for whom it was responsible should be liable in any degree or any extent therefor.

XIV.

Further answering said amended complaint and as a fourth affirmative defense thereto, this defendant alleges that if the plaintiff was injured at the time and place alleged in his complaint, and in the manner therein described, that the unsafe and dangerous condition of said place, and the risks to which plaintiff was subjected in passing over said plank, were open and obvious and known to and seen and appreciated by the plaintiff and that said plaintiff assumed all of the risks incident to his crossing over the said plank.

WHEREFORE, defendant prays that the plaintiff take nothing by his said action; that this action be dismissed and that defendant have judgment for its costs and disbursements herein.

JAMES A. WAYNE,
Attorney for Defendant.

Residence and postoffice address, Wallace, Idaho.
State of Idaho,

County of Shoshone—ss.

Thomas M. Wennan, being first duly sworn upon his oath deposes and says:

That he is acting for D. Repu, manager of the defendant corporation; that he has read the foregoing answer and believes the facts therein stated to be true.

THOMAS M. WENNAN,
Subscribed and sworn to before me this 26th day of May, 1915.

(N. P. SEAL.)

M. CHENOWETH,
Notary Public.

Service of the within answer is admitted this 26th day of May, 1915.

WALTER H. HANSON,
Attorney for Plaintiff.

Endorsed: Filed May 27th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, *Plaintiff,*

vs.

GOLD HUNTER MINING & SMELTING

COMPANY, a Corporation, *Defendant.*

AMENDMENT OF PARAGRAPH IX OF DE-
FENDANT'S ANSWER.

IX.

Answering paragraph eleven of said amended complaint, this defendant admits that by falling from said lagging plaintiff suffered the injuries mentioned and described in paragraph eleven of said amended complaint; but defendant denies that said injuries were received because, or by reason, of the negligence or carelessness of this defendant and denies that said injuries were received by plaintiff without fault or negligence on his part; and defendant denies that the said wounds, or any wounds, suffered by plaintiff, were caused or inflicted upon plaintiff by defendant wrongfully or unlawfully or negligently or carelessly or in any manner whatsoever.

WHEREFORE, Defendant prays judgment as in its answer herein.

JAMES A. WAYNE,

P. O. Address: Wallace, Idaho.

J. F. AILSHIE,

P. O. Address: Coeur d'Alene, Idaho.

Attorneys for Defendant.

Endorsed: Filed June 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff.

vs.

GOLD HUNTER MINING & SMELTING
COMPANY,

Defendant.

VERDICT.

"We the jury in the above entitled action find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,
Foreman."

Endorsed: Filed June 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING
COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause coming on regularly for trial, the respective parties hereto having appeared by their attorneys, and a jury of twelve persons were regularly and duly impaneled and sworn to try said action; witnesses on the part of the plaintiff and defendant

were sworn and examined, and after hearing the evidence and argument of counsel and instructions of the court, the jury retired to consider of their verdict and subsequently returned into court and being called answered to their names and say they find a verdict for the plaintiff as follows:

*"In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING

COMPANY,

Defendant.

We the jury in the above entitled action find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,
Foreman."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED AND ADJUDGED that the said plaintiff have and recover from said defendant the sum of \$10,000, with interest thereon at the rate of 7 per cent per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements in this action amounting to the sum of \$129.15.

Dated this 1st day of June, 1915.

Endorsed: Filed June 1, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

At a stated term of the District Court of the Uni-

ted States for the District of Idaho, held at Coeur d'Alene, Idaho, on Tuesday the 1st day of June, 1915.

Present:

HON. FRANK S. DIETRICH,
Judge.

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING
COMPANY,

Defendant.

NO. 611.

On this day this cause came on to be heard and tried before the court and jury. John P. Gray and Walter H. Hanson, Esqs., appeared on behalf of plaintiff and James A. Wayne and J. F. Ailshie, Esqs., appeared on behalf of defendant. The Deputy Clerk under the direction of the court proceeded to draw from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause. B. F. Tolbert, a person drawn from the box and sworn on voir dire was excused for cause. Adam Aulback, William Wheatley, and G. W. Buzzard, persons drawn from the box and sworn on voir dire were excused on peremptory challenge by counsel for the plaintiff. Charles Garrells, Dougal McCall and Patrick Gannon, persons drawn from the box and sworn on voir dire were excused on peremptory challenge by counsel for defendant, and the following are the names of the persons, drawn from the box,

sworn on voir dire, passed upon, accepted by counsel for the respective parties and sworn by the deputy clerk to well and truly try said cause and a true verdict render therein according to the law and evidence, to-wit: James H. Pew, John Thyne, C. D. Warner, Peter Snyder, Irving McCann, Robert Krone, J. Watson Davis, M. P. Jones, Will Cooper, August Fox, Murray Williams and H. A. Warren.

The court and jury were addressed by John P. Gray, Esq., on behalf of plaintiff, and by James A. Wayne, Esq., on behalf of defendant.

John Holmi, Edward Johnson and John Holmi, recalled, were sworn, examined and cross-examined as witnesses on behalf of plaintiff and plaintiff rests. R. E. Garry, Stephen Shaw, John Lamberton, John Pellisier and George Ashland, were sworn, examined and cross-examined as witnesses on behalf of defendant and defendant rests. Edward Johnson and John Holmi were called in rebuttal for plaintiff and plaintiff rests and the evidence closed and after argument by the respective counsel and the instructions of the court said jury retired to consider of their verdict in charge of an officer of the court who was first duly sworn.

Now came the jury all called and found to be present, being asked if they had agreed upon a verdict, they, through their foreman, stated that they had and presented the following verdict, to-wit:

"In the District Court of the United States for the District of Idaho, Northern Division.

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING
COMPANY,*Defendant.*

VERDICT.

We the jury in the above entitled cause find for the plaintiff and assess the damages at the sum of \$10,000.

C. D. WARNER,
Foreman."

Which verdict was read and the said jury polled an deach juror answered separately for himself that such was his verdict, thereupon the court discharged said jury from the further consideration of said cause.

The defendant in said cause was granted 30 days in which to prepare and serve its bill of exceptions.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING
COMPANY,*Defendant.*

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore and on, to-wit, the 1st day of June, A. D. 1915, being one of the days of the May 1915 term of the District Court

of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. John P. Gray and Walter H. Hanson appearing for the plaintiff and Messrs. James A. Wayne and J. F. Ailshie appearing for the defendant.

And thereupon the plaintiff to maintain the issues on his part introduced the following evidence, to-wit:

John Holmi, a witness duly called and sworn on behalf of plaintiff, testified as follows:

Q. What is your name?

A. John Holmi.

Q. Where do you live?

THE COURT: If you don't understand a question, ask the attorney to repeat it to you, or explain it to you. Be sure that you understand before you answer.

MR. GRAY:

Q. Where do you live?

A. I live at Mullan, Idaho.

Q. Where are you working now?

A. I don't work now.

Q. When did you last work?

A. I work in the Hunter mine.

Q. In the Hunter mine?

A. Yes.

Q. How long since you were working there?

A. I started me work the first of September last year.

Q. How recently have you worked there? When did you last work there, Mr. Holmi?

A. When I left here again—the 26th of last March.

Q. You worked until the time you came down here as a witness, is that what you mean?

A. Yes sir.

Q. Had you been working there right along from last September until you came down here?

A. No; I hurt my eye once, and I had to lay off.

Q. When did you go back to work?

A. I go back to work the 20th of April.

Q. This year?

A. This year.

Q. And worked up until the 26th of May?

A. Yes.

Q. Where were you working last 17th of October?

A. In the Hunter mine.

Q. On what shift, the day shift or the night shift?

A. Well, that might be the same time I worked with Johnson.

Q. Yes?

A. But I don't remember the month. I guess it was October.

Q. What shift was it?

A. I worked night shift.

Q. Do you remember the night Mr. Johnson was hurt?

A. Yes.

Q. Where were you working that night?

A. I was working at the same place as Mr. Johnson.

Q. Whereabouts was that?

A. 400 level in Hunter mine.

Q. What floor?

A. Fourth floor. That was the highest floor.

Q. The highest floor?

A. Yes.

Q. What were you doing, what work were you doing?

A. I was mucking.

Q. What was Mr. Johnson doing?

A. He drilled the holes; he was machine man.

Q. Machine man?

A. Yes.

Q. What time did you go to work that afternoon?

A. Well, we started from outside at half past four, and I don't know what time it was we come to work. It was before five o'clock, I believe.

Q. Now, Mr. Holmi, you are a carpenter, are you, too?

A. Well, I have been sometimes.

Q. Did you make that drawing? (Showing paper to witness.)

A. Yes, I made that.

MR. GRAY: Will you mark it for identification?

Said paper was thereupon marked: Plaintiff's Exhibit No. 1, for identification.

(By MR. GRAY:)

Q. Can you tell the jury what this drawing, which is marked Plaintiff's Exhibit No. 1, what it is supposed to represent?

A. What do you want me to tell?

Q. I want you to tell the jury what this is, what this is a drawing of.

A. This is the 400 level in the Hunter mine, one stope in that.

Q. What stope?

A. That stope may be west.—

Q. That is the stope you and Mr. Johnson were working in?

A. That is the stope.

Q. Is that drawn as well as you can draw it? Does that fairly represent the condition there?

A. That is about like it, but I never take any measure with my rule.

Q. But does it fairly show the general condition of the stope that night?

A. Yes.

MR. GRAY: I would like to offer this in evidence.

MR. WAYNE: Let me see it, Mr. Gray, please.

MR. GRAY: I will have it explained more fully, but it can't be done until it is —

MR. WAYNE: Might I ask the witness one question in regard to this?

THE COURT: Yes.

(By MR. WAYNE).

Q. Mr. Holmi, have you shown on this drawing a timber slide that was in there?

A. Yes, I show that there in the other plan once, in your plan.

Q. You haven't shown it on this plan?

A. No, I don't show it—I didn't remember again—you see, I need some help—but I didn't put it here, because I didn't say—I know it was here, but—

MR. WAYNE: Without admitting the correctness of the plan, we have no objection to its being used for illustrative purposes.

(By MR. GRAY).

Q. Now, what does the bottom represent?

A. That is the 400 level.

MR. GRAY: Have you any objections, Mr. Wayne, to my just adding that, as he describes it?

MR. WAYNE: That is all right.

(By MR. GRAY).

Q. That is the 400 level, is it?

A. Yes sir.

Q. Where is the first floor? What would you call the first floor.

A. That floor here.

Q. And the second floor?

A. The second floor here.

Q. The third floor?

A. Here.

Q. The fourth floor?

A. Here.

Q. Had the fourth floor been timbered?

A. It was not timbered over at that—this all was timbered to here.

Q. To the bottom of the fourth floor?

A. No.

Q. Where were you and Johnson working?

A. We was working on the fourth floor.

Q. Just point out as nearly as you can, if you have pointed out the places where you were working.

A. Here was Johnson running the machine?

Q. The man on the little platform with the machine?

A. Yes.

Q. Where were you working?

A. I was working in more this way, mucking.

Q. The man with the pick?

A. Yes.

Q. What is this that you were standing on?

A. On the muck pile there.

Q. The muck pile is broken through, is that right?

A. Yes.

Q. What is this large opening here, extending through the second and third floors down—the first and second floors, from the third floor, and down on to the level, the one that I marked double X, what is that?

A. That is the ore chute.

Q. Now, what is this extending diagonally upon from the old chute to the fourth floor, marked double Y?

A. They call it the slide chute.

Q. What kind of a slide chute was that?

A. The muck slide along that to the ore chute.

Q. Where were you mucking, into what were you mucking?

A. I mucked the ore down there.

Q. Down what?

A. Down the chute, slide chute. There was a hole in the floor, and it goes in the slide chute.

Q. A hole in the floor, on what floor?

A. The fourth floor.

Q. Then, as I understand, you mucked into the slide chute?

A. Yes sir.

Q. Then the ore ran down here?

A. In the ore chute.

Q. How, Mr. Holmi, just tell the jury the condition of this—how wide was the slide chute?

A. The slide chute was—I don't remember how wide, but not very wide. It was between the posts, all filled up—

Q. All filled up between the posts?

A. I think four feet or less.

Q. What do you mean by the posts?

A. I marked the posts here, this small line here. The posts was eight feet long.

Q. How do they put the posts in?

A. The timbermen put the posts in.

Q. Which way do they run, up and down or across?

A. From down to plumb up.

Q. You say this slide chute extended from the posts on one side to the posts on the other?

A. Yes.

Q. Was the top of the ore chute open?

A. It was open, sure, had to be open.

Q. How far across the drift?

A. It was pretty wide. I don't remember how wide it was. I think it was three feet, I never measured it.

Q. How close did it come to the timbers on the sides, the opening there?

A. The posts?

Q. Yes, the posts?

A. Just close to the wall, just up against the wall.

Q. The ore chute was against the wall, is that it?

A. The posts, you mean?

Q. No, how far—

MR. GRAY: Your Honor, I don't want to indicate what I want—

THE COURT: Well, you can call his attention to—

MR. GRAY: Did the opening of the ore chute there extend clear across the stope, the floor, or only part way?

A. I think it was put in the whole way.

Q. Around the edge of the top of this opening was there anything on the floor, on the side there?

THE COURT. You mean any guard?

MR. GRAY: No, any muck, or rocks, any rocks, or anything around.

A. Both sides like this way, you mean?

(By MR. GRAY.)

Q. Yes?

A. Yes, there was the muck. That always come muck down pretty quick.

Q. What do these represent, Mr. Holmi?

A. Them is the ladders going to work.

Q. And these over here also are ladders?

A. Yes sir.

Q. Now, how far up did the man-ways over here

on the right hand side, on the east, how far up did that extend?

A. How far up?

Q. Yes?

A. The third floor.

Q. Did that man-way extend at all up to the fourth floor?

A. No, it wouldn't be that.

MR. AILSHIE: You referred to that as the east, there.

MR. GRAY: I don't know whether it is east or west.

MR. AILSHIE: I wish you would have him locate it.

MR. GRAY: That is very clear. You can locate that on cross examination.

WITNESS: That is west.

(By MR. GRAY.)

Q. That is west over there?

A. Yes.

Q. This is east over this way?

A. Yes.

MR. GRAY: Well, we will mark W. and E. I don't know that it is very material which way it is.

MR. AILSHIE: Well, I would like to have it accurate.

(By MR. GRAY.)

Q. What does this represent in here between the second and third floor?

A. That is the ladder which was broken.

Q. Now, Mr. Holmi, do you recollect when that

ladder was broken, how long before Mr. Johnson was hurt?

A. It was broken the first night I go on.

Q. How many nights before was that?

A. I worked all together four nights in that stope.

Q. Then it would be the third night before the injury?

MR. WAYNE: I object to that, because it is too suggestive.

THE COURT: Sustained.

A. I came up this ladder the first night it was broken.

MR. GRAY:

Q. How much of it was broken the first night?

A. It was about like this, you see.

Q. How about the next night?

A. It was more broken.

Q. More broken?

A. Yes.

Q. Now how badly broken was it the next night, the second night you went up there?

A. I believe I came up two nights over that ladder. It was badly broken another night.

Q. What night was it that Johnson was hurt?

A. It was the last night, the fourth night I was working.

Q. The fourth night you were working?

A. Yes.

Q. And could you get up that ladder that night?

A. No, it was all broken.

Q. Do you know what broke it?

A. That ladder?

Q. Yes?

THE COURT: How was it broken?

A. It was broken all together in pieces, and I saw small piece under the muck pile; there was a muck pile up the first night, that wouldn't reach the cap.

Q. But a muck pile around it, it was in the muck pile, was it?

A. Yes, and rock.

Q. Now, how did you go to work that night?

A. Up this way.

Q. By this way—you point it out and I will read it.

A. To the first floor—

Q. By the ladder-way?

A. And this way.

Q. To the second floor by the ladder-way?

A. And this.

Q. Then you went over to the face, did you?

A. Yes.

Q. Then where did you go?

A. Came up here.

Q. In other words, you went up to the face, and then by the lagging from the face up on to the third floor?

A. Yes.

Q. Then how did you go?

A. We go up to the ladder and came by the ladder.

Q. Up to the ladder between the third and fourth floor, and then on up that ladder to the fourth floor?

A. Yes, that is the way.

Q. Mr. Holmi, in going from your place of work up here on the fourth floor down to the level on that night, was there any other way that you could go?

A. No. That was the best way, anyhow.

Q. How about this other man-way, could you go that way?

A. That was so dangerous he might kill himself going over the chute there.

Q. You have told the jury that the chute extended from post to post?

A. Yes sir.

MR. AILSHIE: I object to that, as it hasn't been shown that—

MR. GRAY: He testified that it did.

THE COURT: Let us not repeat it then.

(By MR. GRAY.)

Q. How close were the posts to the side of the drift?

A. I meant the other side was—I meant—

Q. This part of it that is marked A in a circle, does that represent a section across the floor there at the chute?

A. Yes sir.

Q. And what are these uprights—

A. Them is posts.

Q. Those are the posts?

A. Yes.

Q. What does this irregular line on the side of them represent?

A. That means the wall.

Q. What does this line between the posts represent?

A. That means the slide chute there.

Q. Now, Mr. Holmi, how was the condition between the posts and the wall, what was that condition as to its being clear, or was there rock or muck or anything else there?

A. The last night it was full of muck.

Q. Between the posts and the wall?

A. Yes.

Q. Now, what did Johnson do after he went on shift?

A. He started to drill the holes.

Q. What happened then?

A. He say his machine was leaking, and he say he had to get a better machine.

MR. AILSHIE: We object to what Mr. Johnson said, and move to strike out what he said.

THE COURT: Oh, that will do no harm.

(By MR. GRAY.)

Q. What did he do then?

A. He needed to change to a better machine, he say.

Q. What did he do?

A. He take his machine and gone down, he say, gone down and change his machine.

Q. Which way did he go. Where did he go—down the same way you said you had come up?

A. Yes, sure.

Q. Now, did you hear him fall, or what did you do next—

MR. WAYNE: I object to that as suggestive and leading.

MR. GRAY:

Q. What did you next know about it?

A. I knew when Johnson hello me.

Q. Hello you?

A. Yes, he told my name, and I heard something like that.

Q. Then what did you do?

A. I go down and see where he is, what place he is now.

Q. Where did you find him?

A. I find him on the first floor.

Q. Just indicate to the jury where, Mr. Holmi?

A. Down here.

Q. Where that man is lying now?

A. Yes.

Q. What position was he in?

A. Well, I can't put my words right.

Q. I mean was he standing up or lying down?

A. Lying down, something like that.

Q. Did you see the machine?

A. Yes.

Q. Where was it?

A. The machine was one side of him.

Q. What did you do then?

A. Well, we get to the station, and Johnson go up. He say he can't work no more.

Q. You took him out?

A. That night.

MR. AILSHIE: We object to him saying that he

took him up. He didn't say he took him up.

MR. GRAY: What difference does it make?

MR. AILSHIE: I object to the question.

MR. GRAY:

Q. Explain to Judge Ailshie, just so he will know, know just what you did, and how Johnson got out, and all about it. He wants to be very particular about it.

MR. AILSHIE: I object to that kind of question, if Your Honor please, and take exception to it. I haven't asked that any explanation be made to me, but that it be made to the jury.

THE COURT: Yes, that is true. We have some difficulty on account of the inability of the witness to express himself clearly, but within general bounds at least we must keep within the rules. You may explain what you did after you found Mr. Johnson there, lying down, you say?

A. Yes.

THE COURT: What did you do with him or what did he do?

A. I first think I go to help him up both sides, lift up, put my hands in his sides, and I lift a little, and he say, "Don't lift me up because that hurt me; I try it myself," to get up here, and he get him up. At the time he get up, but I didn't help him no more than walk before him to the 400 level, by the man-way, by the ladders, and then we walked to the cage, and he gone to the cage, and I gone back to work.

(MR. GRAY).

Q. When you went back there, when you went

down to where Johnson was, just tell the jury what the condition of this plank was, what kind of a plank was this here, this plank from the third floor to the—

A. It was six feet long and three inches thick; I believe it was eight inches wide.

Q. Just tell the jury whether it was nailed or not.

A. I can't tell that, because I don't know, but that looks to me—it stay the same way it was as we go up in the night.

Q. Now, just tell the jury what there was there in the way of a railing or rope, or any guard along the side of it.

MR. WAYNE: All these questions are suggestive, Your Honor. He can have him describe the condition there at the place.

THE COURT: I think he may answer this. Was the plank guarded in any way?

A. No, it wasn't. All the ways I came down—I gets down other hand in here, and then walk along this, with my weight along this, and came down to there, to the second floor.

(By MR. GRAY:)

Q. You had worked there three nights with Johnson, I believe you said?

A. I worked four nights.

Q. This was the fourth night, the one he was injured?

A. Yes sir.

Q. Just tell the jury what kind of a worker he was?

MR. WAYNE: I object to that as immaterial.

MR. GRAY: You admit that he was a good miner?

MR. WAYNE: We make the admissions in the answer.

MR. GRAY: Well, I think I will let him answer that.

MR. WAYNE: Well, I have an objection to it.

THE COURT: Sustained, I doubt whether the witness is competent to answer. He only worked with him three days, I understand.

(By MR. GRAY).

Q. Did you know Mr. Johnson before you worked there with him?

A. Yes, I know him awhile ago.

Q. Can you tell the jury what his general appearance was as to health or being a robust man?

MR. WAYNE: The same objection to that.

THE COURT: How long had you known him?

(By MR. GRAY).

Q. How long had you known him, Mr. Holmi?

A. I know him when he started to work in the Hunter mine, in all, the first of September; I guess it was the first day he was working in the 800.

MR. GRAY: I think that is sufficient, Your Honor.

THE COURT: You may ask him now.

(By MR. GRAY).

Q. What was his general appearance as to being a healthy man or otherwise.

MR. WAYNE: I object to that as incompetent,

irrelevant, and immaterial, because the witness is not qualified.

THE COURT: Overruled.

MR. WAYNE: We have an exception to all adverse rulings?

THE COURT: Yes, all adverse rulings are deemed to be excepted to. State how he looked, whether he looked like a well man or not.

A. Oh, yes, he looked like—I don't know if I can say the words—he looked good.

(By MR. GRAY).

Q. Now, Mr. Holmi, just tell the jury what the condition was below this plank and around it, as to whether or not there was any timbering around it, beneath it, on the side of the plank? You say it was an eight inch plank?

A. Yes.

Q. Was there any timbering on the sides of it, or any flooring on the sides of it?

A. You mean this way?

Q. Yes.

A. Yes sir.

Q. And the first night that you went up, how did you go up to the fourth floor?

A. The first night, I go up the same way to the first floor, and to the second floor, but from the second floor we came up this ladder.

Q. The ladder which you say was partially broken, you came up that the first night?

A. Yes.

Q. Now, you refer to what was known as the east man-way. This is the east man-way is it not?

A. I guess so, yes, that is the east man-way.

Q. And that was the way you went up the first night?

A. Yes sir.

Q. Now, this east manway is pretty close to the ore chute, it is not?

A. Not far, because this ore chute is right in, pretty near behind that.

Q. You have gone—

MR. GRAY: He says this ore chute. Won't you just mark that, mark it B?

MR. WAYNE: You have got the other marked "X." I will mark it X-2.

MR. GRAY: Don't mark it the same.

(By MR. WAYNE).

Q. This one marked B is another ore chute, is it?

A. Yes sir.

Q. The man-way that you went up that night, is located right near the ore chute B, isn't it?

A. Yes.

Q. And this man-way was used by the muckers to dislodge any ore or rock which might catch or stick in the ore chute, wasn't it?

A. I don't—

Q. I will withdraw that question, then. Sometimes the rock or ore would catch and stick in the ore chute, would it not?

A. Sometimes—

Q. And not go down. What I mean is that the ore and rock catches in the ore chute so that you have to go up the ladder and push it down?

A. Oh, yes, sometimes, but not a chute like this.

Q. Not a chute like that?

A. No, because that was on the third floor. It made the long chute.

Q. The long chute, it might catch in that?

A. Yes.

Q. What I am getting at, Mr. Holme, is this, wasn't this east man-way used by the muckers, including yourself, to get to the chutes to clean them when there might any rock get through in them?

A. I don't know. I never cleaned the chutes.

Q. You didn't?

A. No.

Q. Now, on the second night that you went to work on the fourth floor, did you go up this same way?

A. I think I came two nights.

Q. And the second night you went up the broken ladder, which you say was from the second to the third floor?

A. I believe so.

Q. Now, the third night, how did you go up to the fourth floor?

A. I don't know if I the third night came up this way, or might I gone up here.

Q. On the third night you don't know whether you went over this lagging or whether you went up the broken ladder?

A. Yes, sir.

Q. On the first and second nights when you went to work, did you know that there was a plank or lagging over the east end of the stope?

A. No.

Q. Who was it that first told you that there was such a lagging?

A. I don't remember. It was that night, somebody—we came on the second floor, and then I saw this ladder, which was broken. I couldn't get no way up that, and my partner told me he know a better place going up on this end.

Q. And showed you the place?

A. Yes, he said "I notice they have put a lagging over here, and we get here over."

Q. Who was the partner that told you that?

A. I don't know, but it might was Johnson; it might was the car-man.

Q. The car-man, that is, Pellichier?

A. Joe Pillichier.

Q. It was either Johnson or Pellichier then who told you of this plank or lagging?

A. Yes, sir, I believe so.

Q. And then you think that on the third night for the first time you went up by means of this lagging?

A. It might was the third night.

Q. Either on the third or fourth night?

A. I don't remember.

Q. Well, it was either the third or the fourth night that you went up that way?

A. It was either, yes.

Q. Now, Mr. Holmi, you knew at that time that there was a west man-way completed from the sill floor to the third floor, did you not?

A. Yes, I knewed that.

Q. And the ladders were in good condition in the west man-way, were they not?

A. I never go in them man-ways except on the first night I was working there. I never saw them man-ways after the first night.

Q. That you hadn't seen them on the first night—

MR. GRAY: I understood he hadn't seen them at all.

THE COURT: I so understood him. Did you ever see those man-ways?

A. Oh, yes, I saw them the first night.

(By MR. WAYNE:)

Q. On the night Johnson was hurt, Mr. Holmi, you say you went up in the east man-way and over this plank?

A. Yes, sir.

Q. Now, you could have gone up the west man-way to the third floor, could you not?

A. Oh, yes. Why not?

Q. And you could then walk on the third floor past the slide chute to the ladder near the easterly ends of the stope, and up that ladder to the fourth floor, could you not?

A. No, we have to come here between the posts over the slide and that was the hole open.

Q. Now, Mr. Holmi, will you just show the jury with your hands how much space there was between the walls or the side of this stope on the third floor and this timber slide?

A. Between the posts and the walls?

Q. Yes.

MR. GRAY: Mr. Wayne, you didn't ask him that at first.

A. The other side was the wall.

Q. On one side there was nothing, is that what you mean to say?

A. Yes. And the other side—like nine feet—here was nothing, and may be this place was like that, and was a little more, down to the bottom.

Q. Now, let us see. What would you say it was, two feet?

A. Eight inches.

Q. At the bottom?

A. Yes.

Q. And what you mean to say is, as you have shown it on this little drawing, that at the bottom between the side of the stope—

A. Yes.

Q. And the posts there was about an eighteen-inch space?

A. Yes.

Q. And then the side or wall of the stope went upward on a slant?

A. Yes, and I don't know the slant. That was—here was close, on top.

Q. In other words, at the top it was close?

A. Yes.

Q. There was very little distance, if any, or very little space between the side of the stope and the post?

A. That was used together, that was the post

against the wall in there on the top, eight-feet posts.

Q. Those are nine-foot floors, are they not—nine feet from floor to floor?

A. Yes.

Q. Now, a man of ordinary height, say five feet and ten inches high, could pass between the side of the stope or the wall of the stope and posts, could he not?

A. The first night I go through that hole, I remember that. I have to a little bit come down like that, and go sideways.

Q. You had to stoop and go sideways, but you could get by, did you?

A. Yes, sir.

Q. Do you remember who took Johnson's place there on the machine after he was hurt?

A. Yes, sir, a man.

A. Who was it?

A. It was George Ashland.

Q. And do you know how he came up to the fourth floor?

A. I don't remember how George came up.

Q. Do you remember George Ashland going down for his steel?

A. Going down?

Q. Yes, down to the sill floor for his steel?

A. No, but he never asked me a question, about George before here, and I don't remember what way he came up.

Q. Don't you know that George Ashland came up or went down for his steel, and went down this

ladder in the east man-way from the fourth floor to the third floor, and then went past the slide chute and timber slide to the man-way at the west end and down that way?

A. No, that wasn't possible.

Q. You don't think it was possible?

A. No.

Q. Now, Mr. Holmi, did you continue to work there as mucker after Johnson was injured?

A. If I am—

Q. I will withdraw that question. Did you work on the fourth floor for several shifts after Johnson was injured?

A. No. it was the last shift I worked with Johnson.

Q. Well, did you work with anybody afterwards on the fourth floor?

A. With anybody? No.

Q. Was that the last shift that you worked there?

A. That was the last shift I worked in there, in this stope, that Johnson got hurt.

Q. You worked that full shift, did you not?

A. The full shift, yes.

Q. And when you quit work on that shift that night or the next morning, how did you go down to the level?

A. By the same way we come up.

Q. By the plank?

A. Yes.

Q. Anyone go down with you?

A. Yes, George came after me.

Q. Did he go the same way?

A. Yes.

MR. GRAY: Who?

A. George Ashland.

(By Mr. Wayne)

Q. Now, that was a six-foot lagging, was it not?

A. Yes, sir.

Q. Three inches thick, you say, and eight inches wide?

A. I believe it was eight inches.

Q. The upper end of the lagging was set on what?

A. On a cap.

Q. And the lower end on a ledge of rock?

A. It was rock against the end of the stope, against the rock.

Q. And what difference in height was there between the upper end and the lower end of that lagging?

A. Maybe two and a half and three feet.

Q. Between two and a half and three feet?

A. Maybe.

Q. Were there any lights at that place?

A. No; no light in there. Everybody got his candles.

Q. They don't have the electric light in the stopes, do they?

A. No.

Q. How many times had you gone over that plank with Johnson before he was injured?

A. How many times?

Q. Once or twice, or—

A. That was in the last night that Johnson got hurted, and that night I gone over it only once with Johnson.

Q. Mr. Holmi, how long have you known Mr. Johnson?

A. I learned to know him in the Hunter mine last September.

Q. You and he are of the same nationality, aren't you?

A. I never asked Johnson, but I don't believe I heard him talk—I heard him say his old country money was called crowns, and mine is marks.

Q. You are both from Finland, aren't you?

A. No, I don't believe so.

Q. You were very good friends, were you not, you and Johnson, you and Johnson are very good friends, are you not?

A. Oh, yes, I have seen him.

Q. You mentioned the fact that you were laid off for some time on account of an injury to your eye?

A. Yes.

Q. You received that injury in the Hunter, did you not, in the Hunter mine?

A. Yes, I had me eye hurt in the Hunter mine.

Q. And you still have an unsettled claim for damages against the Hunter mine on the account, have you not?

A. I want the help. I want another man to help me to talk.

Q. Well, Mr. Holmi, I will put the question in another way. You are making a claim for damages

on account of that injured eye against the Gold Hunter Mine, aren't you?

THE COURT: You want the Gold Hunter Mine to pay you because your eye was injured, you say your eye was hurt?

A. Yes, my eye was hurt.

THE COURT: Now, you want the mining company to pay you for hurting your eye? You understand that, don't you?

A. If you ask, if you like—I never asked that, anyway.

THE COURT: You never asked them to pay you?

A. No, I never thought that they—

(BY MR. WAYNE:)

Q. How long were you off that time that you injured your eye?

A. I laid off on the 7th day of February and started to work the 20th of April.

Q. Haven't you been threatening to sue the Gold Hunter on account of the injury to your eye, Mr. Holmi?

A. No sabe.

Q. You don't understand, or is it no sir?

A. I don't understand.

MR. WAYNE: That is all.

THE COURT: That is all, Mr. Holmi.

EDWARD JOHNSON, A WITNESS DULY CALLED AND SWORN IN HIS OWN BEHALF, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. GRAY:)

Q. State your full name.

A. Edward Johnson.

Q. What is your nationality, Mr. Johnson?

A. Swede.

Q. Born in Sweden?

A. Yes, but I got citizen's papers here in this country.

Q. You are a naturalized citizen?

A. Yes, sir.

Q. How old are you, Mr. Johnson?

A. Thirty-three.

Q. Where do you live?

A. Up at Mullan.

Q. And what is your business?

A. Miner.

Q. How long have you followed mining?

A. Ten years, or a little over, I guess.

Q. Where?

A. I have been here over eight years, and then in Michigan, in the copper mines.

Q. Michigan first, and then in the Coeur d'Alenes?

A. Yes, three years over there at Michigan.

Q. Where were you working last October?

A. At the Hunter mine.

Q. And where is that?

A. That is up at Mullan.

Q. What kind of work were you doing?

A. I was doing miner's work, drilling with a machine, making a hole with the machine.

Q. How long had you worked there at the time of your injury?

A. Well, I was working on that place, I believe, about three or four weeks on that place.

Q. But I mean how long had you worked at the Gold Hunter Mine?

A. All together, you mean?

Q. Yes.

A. All together, I guess I been working about four years, I think.

Q. What kind of work did you do besides running the machine?

A. I was working on the shaft a while.

Q. What wages do shaft miners get?

A. Four dollars.

Q. How long have you worked as a shaft miner?

A. I got four dollars.

Q. What were you earning at the time of your injury?

A. Three dollars and a half at that time. I came up from the shaft.

Q. Who was working with you the night of your injury, that is, up in the same stope?

A. John Holmi.

Q. He is the man who was just on the witness stand?

A. Yes, sir.

Q. Whereabouts in the Hunter mine were you working the night you were injured? Just tell what level, and what floor.

A. I was working on the fourth floor, the top of the fourth floor, starting in the floor.

Q. Starting another fork of the floor?

A. Yes.

Q. On what level?

A. 400 level.

Q. Who was your immediate boss; who was your superior?

A. Steve Shaw.

Q. What position did he have there?

A. He look after the men, miners.

Q. What do they call him?

A. Shift boss.

Q. What time in the day did you go to work?

A. We started in from the outside at half past four, and then we started work at five.

Q. You are a married man?

A. Yes.

Q. Any children?

A. Yes.

Q. How many?

A. Two.

Q. How old are they?

A. One is three, and the other one is five, maybe six.

Q. What did you first do when you went in?

A. When I went in I went up in my place where I used to work, and barred all that loose ground down, and put the machine in, and started to drill, put a little platform in, and started to drill.

Q. Then tell what happened.

A. Well, my machine was out of order; she was leaking.

Q. Leaking what?

A. Leaking in this joint here, you know, and that was worn out, and she was leaking air out. She didn't work, and I didn't have no doings to fix that over there, and I asked the nipper if there was any machines up on the top station, and he said he don't know, "You go up and look, you take your machine along and go up there and look at it."

Q. What had been the practice when your machine got to leaking or out of order?

A. We got to take it to the station and get another one.

Q. How long had that been the practice there?

A. All the time I had been there.

Q. Had you had any orders to that effect?

A. Yes.

Q. Who from?

A. From the shift boss and foreman. He come around, and every time the machine broke he told me, "You better take that down and get another one."

Q. Now you have seen this picture or plat that Mr. Holmi drew?

A. Yes.

Q. Does that correctly represent the general conditions around there?

A. I don't understand, quite.

Q. Does that fairly represent the stope where you were working?

A. Oh, yes, that is pretty close to it.

Q. Now, in what way did you go to work that night, how did you go up?

A. I went up this ladder here.

Q. That is on the east?

A. That is on the east end of the stope, this ladder.

Q. You went up this ladder?

A. Yes.

Q. From where to where?

A. From the drift up to the first floor and out, and then up to the second floor, and this ladder here was broke.

Q. That is, the ladder from the second to the third?

A. Yes.

Q. Yes?

A. And the plank was up in here, and the rocks came down out of the hole, and came down the man-way and broke it.

Q. You are pointing above it.

A. Yes. And broke this man-way.

Q. Then how did you go from there?

A. From there I went up from here over here.

Q. That is over to the face?

A. Yes, over to the face, and walked over here, and walked upon this plank, and went this way.

Q. That is, up the plank or lagging on to the third floor?

A. Yes.

Q. Then how did you go?

A. Up this ladder to the top floor.

Q. To the fourth floor?

A. Yes.

Q. How long had this ladder in the man-way between the second and third floors been broken?

A. It was partly broken the third night. There was a piece laid here.

Q. You mean where?

A. The top part was broken from here.

Q. You say the third night. What do you mean by the third night?

A. The third night before I got hurt.

Q. Now, go ahead.

A. The muck had come down and was around here, here was muck, all filled up around here.

Q. Around the ladder?

A. That hold the ladder up anyway, because the end was broke here, but the muck pile was around, and the hold the ladder up anyhow, and I could get up there that night, and then the second night before I got hurt, you know, the night before I got hurt, then when I came on shift the hole was blocked up, and there was pieces left, and then I have to go that way, and go this way up to the fourth floor.

Q. By that way, you mean to the face and up this plank?

A. Yes.

MR. AILSHIE: We object to counsel explaining and interpreting what the witness says.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Now, then, Mr. Johnson, who did you say your shift boss was?

A. Steve Shaw.

Q. Was he up in that stope the night before you were injured?

A. Yes.

MR. WAYNE: I object to that as leading and suggestive.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Did you have any conversation or talk with him up in the stope the night before you were hurt?

MR. WAYNE: The same suggestion to that, that it is suggestive.

THE COURT: Overruled.

(BY MR. GRAY:)

Q. Just tell the jury what that conversation was, as nearly as you can recollect, what you said and what Steve Shaw said.

A. Steve Shaw came up that way.

Q. What way?

A. That same way I came up. I couldn't get no other ways up, because the slide chute was across the stope on the third floor; the ladder came up from the west end of the stope, but the slide chute was across the stope, and they couldn't get by that slide chute, because behind the slide chute was filled up with muck, the sides was filled up with muck. There was a little hole between the post—the posts was laying straight here (indicating), but there was a little hole down on the bottom of the posts, between the ground and this post, but that was all filled up with muck the night before I got hurt already, I couldn't get by that way no how. I don't see no chance to get by.

THE COURT: What did Shaw say to you?

(BY MR. GRAY:)

Q. Just tell what you and Shaw said?

A. I don't understand, quite.

THE COURT: You said Mr. Shaw came up there and you talked together.

A. Yes.

THE COURT: Tell the jury what you talked about.

A. Shaw came up, and he said, "This is like a whore house; a man can't get up here no way;" he said, "How did you get up here?" And I said, "It is pretty hard to get up here; you have to go like a rabbit on the timbers here, but you better get a ladder here," and he said, "Yes, I get the timber men to put them ladder over there; I get the timber men to put the ladder over there."

(BY MR. GRAY:)

Q. When was that now?

A. The night before I get hurt. He said, "You go that way now, on that plank, so long as the timber men come up here. I get the timber men up here as quick as I can, to put that ladder there."

Q. Who put ladders up, and did that kind of work?

A. The timber men used to do that.

Q. Was that any part of your duty?

A. No, I didn't have nothing to do with it. Only mining was my—

Q. What shift was this?

A. Night shift.

Q. Did any timber man work on the night shift?

A. One part—two men worked that time on the night shift.

Q. Was there anything else said about ladders?

A. No. He said he go and fix that. He said he give the foreman orders already the day before, that he sent the ladder in, you know, that he gave orders to make the ladder and send in the ladder.

Q. Now, who had charge of the timber-men?

A. The shift boss and foreman.

Q. Coming back now to this slide chute, I think you have probably described that. What is this big opening here, running from the third floor down to pretty nearly the 400 level?

A. That is the ore chute, made between the posts and the wall, that is the chute; ore goes down in the chute.

Q. What was the condition of the top of that?

A. The floor on the top there used to be, but now when they made that slide chute they have to open up the floors, and then the rock broke the floor more, and there was the whole floor up, and there was only about that much place on the sides, you know, and that was filled up with muck like this.

Q. You say, "like this." How much?

A. About eight inches.

Q. Eight inches on the side?

A. Yes.

Q. That would be along the wall, would it?

A. Along the wall, yes.

Q. What condition was that in?

A. That was in there just for the—in there—the rest of them had blocked it up, blocked it up with the blasts.

Q. Was there anything on that plank, that six or eight inches?

A. There was muck, like that.

Q. Muck?

A. Yes, it fly all down on the slide chute, the muck go over that chute anyway, only about an eight-inch board on the side, you know, on the side, on the planks, you know.

Q. That is, on each side of the slide chute, a six or eight-inch board?

A. Yes, the slide chute was about three feet and a half wide, I guess, and a board on each side of that.

Q. How close to the posts did the slide chute extend?

A. From post to post.

Q. How about the ore chute, how far across the drift did it extend?

A. The ore chute?

Q. Yes.

A. He was all open, you know, only a narrow little plank on the other side; I remember the other side was all broken to the wall.

Q. Which side was that?

A. That was the hanging wall side.

Q. Is this the hanging wall here?

A. Yes.

MR. GRAY: I will mark this "W."

(BY MR. GRAY:)

Q. That is the hanging wall?

A. Yes. And the vein leans a little; it make a little crack between the floor and the post here, this end of the post across the ground, the top end of the post is across the ground, and the lower end of the post, and it comes a little opening on the bottom, you know.

Q. That would be along the side of the ore chute?

A. Yes, on the front side of the ore chute.

Q. And on the other side of the ore chute, you say there was about eight inches of plank?

A. Yes.

Q. That would be on the footside wall?

A. No, on that side, I mean.

Q. On which side was there about eight inches of—

A. On this side here.

Q. That would be on the hanging wall side?

A. Yes.

Q. And on the foot wall side it was all broken?

A. It was all broken.

Q. Around the top of this ore chute, was that built up any, or was there—

A. No, there was only rock around that, rock pile, you know, laying all around it.

Q. Was the man-way on the west end, did it extend above the third floor?

A. No, it came up to the third floor, not further.

Q. When was it that you first had to go up this

way, you see, along here, and along this place, what night?

Q. The night before I got hurt.

Q. Was that the first time you went up this way?

A. Yes.

Q. And then also the night before you were hurt?

A. Yes.

Q. Tell the jury what happened after you took down this machine.

A. Well, I took my machine down; my machine was out of order, so I took my machine and I took it on my shoulder, and started to pack it that way, and took the hose off the machine, and took the machine, and put it on my shoulder, and then I walk a little ways, so long as I had room to walk, with the machine on my shoulder, and then I took it in my hand, when the ground was too low, and I had to bend down like this, and pack it in my arms.

Q. How did you go from the fourth floor down to the third floor?

A. I went on that ladder down to the third floor, you know.

Q. Then how did you go?

A. I had my machine in my arms, you know, and I came down to the third floor.

Q. Yes?

A. And then I walked through the third floor to that end, you know.

Q. Yes?

A. And stepped on that place there, and walked a little ways on that plank, and then I don't know

how it happened: I don't know if that plank turned a little and my foot slipped—everything happened so quick that I couldn't tell which way it went there.

Q. Then what happened to you, when did you next know anything?

A. Then I was down on the first floor when I wake up there.

Q. When you wake up?

A. Yes. I went wrong, you know, and then I wake up, and I started to stand up, but I couldn't get no wind, so I was laying there for a while, so I get a little wind, so I could holler a little to my partner, and I hollered up to John, and then he heard me, and he come down fast, and he asked me what I want.

MR. WAYNE: I object to the conversation.

(By MR. GRAY:)

Q. What happened then? You need not say what you told him. Just say what was done with you or what you did.

THE COURT: What did you do after he came down. What did you do then?

A. After I—

THE COURT: No, after Mr. Holmi came down, after he came down and found you, what did you do?

A. I was laying down there yet. I don't have enough wind so I could get up, and then my back was sore, and the machine was close to my back when I get up first, but I could—the back was awful sore, and then when Mr. Holmi come down he asked me what is the—

MR. WAYNE: I object.

(By MR. GRAY:)

Q. Not what Holmi said. What did they do with you or what did you do?

A. Holmi want to help me out, and took hold of my arm, and he wanted to lift me up, you know, but I couldn't stand it, because my breast was sore here, and the rib here, and I couldn't stand it, and he took the arm, and so I said, "I try to pull myself up on the hand-way." I had a candle stick, and he hung it up. When he showed the light I found the candle stick, and he gave me the light on the candle stick, and he found my hat. The candle stick was right beside me.

Q. How did you get out of the mine?

A. I could walk a little. I pulled down the man-way, and the left arm, I had power in the arms then yet, you know, and I could go down the man-way, hold with the hand, and go down the man-way, and could walk a little easier,—the staging was up close.

Q. How did you get from the man-way and go to the station?

A. I took hold of the wall, and I was awful sore, you know, every place was like it was rub up.

Q. Then how did you get out of the mine?

A. The cage just happened to come up when I got to the station and the nipper came up from the bottom, and I went up with him then to the station, to the top station, and then the motorman took me outside from the mine, from the station.

Q. How did you get home?

A. They took a rig, and took me down to the doctor's office with a rig.

Q. What doctor?

A. Dr. Ross.

MR. WAYNE: I object to any more of this as immaterial, under the present condition of the pleadings.

MR. GRAY: What do you mean, Mr. Wayne?

THE COURT: I am not very familiar with the pleadings.

MR. WAYNE: Under the amendment made this morning, if Your Honor please, we admit the injury as described in paragraph eleven of the complaint, of the amended complaint. In other words, we contest only the question of how those injuries were received. If Your Honor please, if you will take paragraph eleven of the amended complaint, and the amendment to our answer, which I filed this morning, you will see that there is no issue raised as to the nature or extent of the injuries.

MR. AILSHIE: There is no issue as to the injury whatever; the only issue is as to the question of the defendant's negligence, whether there is any negligence in this case.

MR. GRAY: In other words, you admit that he was injured, permanently injured?

MR. AILSHIE: We admit it just as that paragraph alleges it, so far as the nature of the injury is concerned. The method of receiving it and the manner of receiving it is the only issue.

MR. GRAY: Notwithstanding that, I think the witness has a right to explain even in more detail than alleged the injury which he is suffering.

MR. AILSHIE: I submit, if Your Honor please, that when the issue is not tendered, that no evidence is admissible.

THE COURT: The allegation seems to me to be somewhat full. It seems to me it would be unnecessary to take up time to go into it.

MR. GRAY: You may inquire.

CROSS EXAMINATION.

By MR. WAYNE.)

Q. Mr. Johnson, how old did you say you were?

A. Thirty-three years.

Q. For how many years have you been a miner?

A. For about ten years or a little over, I guess, I have been working in the mines.

A. For how many years or for what period of time have you worked in the Gold Hunter Mine?

A. How many years?

Q. Yes, or how long?

A. Well, I don't know; I can't tell for sure, but around four years, I guess.

Q. Have you ever worked in any other mines in the Coeur d'Alenes?

A. Oh, yes.

Q. What other mines?

MR. GRAY: Will you permit me to ask him just one question?

MR. WAYNE: Certainly.

(By MR. GRAY.)

Q. Around this plank Mr. Johnson, were there any railings or hand-holes or guards?

A. No.

MR. GRAY: That is all.

By MR. WAYNE.)

Q. What other mines in the Coeur d'Alenes have you worked in besides the Gold Hunter?

A. At the Morning mine, and the Snowstorm.

Q. They are both up in the same locality as the Gold Hunter?

A. Yes.

Q. Near Mullan?

A. Yes.

Q. Now, for how many days or weeks before you were injured had you worked it in this west stope on the 400 foot level?

A. I don't know correctly how many days, but I think around three or four weeks.

Q. Around three or four weeks?

A. Yes, maybe more; I ain't sure now.

Q. You worked there before the fourth floor was being worked, did you not?

A. Yes, I worked on the second floor too, I started—It was finished up so that third floor when I went up, that they took that end out with the machine, and I worked that out.

Q. Now, it was the custom there in opening a stope to open it at the west end first, was it not, in this particular stope?

A. I don't understand what you mean.

Q. They did the first work on any of these floors in this stope at the west end, did they not, first?

A. I don't understand that.

Q. When you went to work they were working on the second floor in this stope, were they not?

A. Yes.

Q. And you worked on the second floor, didn't you?

A. Yes.

Q. And you also worked on the third floor, did you not?

A. Yes, I worked on the third floor too.

Q. Didn't they, in the Hunter mine, in this particular stope, take the rock down at the west end of the stope first, before they took it down in the east end?

A. Which end they started to run, you know, which end they started to work with the machine, you know.

Q. Didn't they start to work with the machine in the west end first?

A. Yes, they start over there now, on the west end that time, and the time before too.

Q. And then after they had the rock and ore stoped out for the height of a floor, they then put in a man-way up to that floor, and put a ladder in it, didn't they?

A. Yes.

Q. And you were familiar with the man-way in the west end of the stope, weren't you?

A. I don't understand.

Q. You know there was a man-way?

A. Oh, you, I knew that.

Q. And at the time of your injuries that man-way was complete to the third floor, and provided with ladders, wasn't it?

A. Yes, to the third floor.

Q. Now, the ladder which you say was broken was not in a man-way was it?

A. It was there in the man-way, but he was broken; the man-hole was there and the ladder was there, but he was broken.

Q. Isn't it a fact, Mr. Johnson, that the ladder which became broken was one which had been taken from the west man-way and brought down to this second floor, and just put from floor to floor, but not in a man-way?

A. I don't know that.

Q. During the three or four weeks that you worked in this stope, or was it two or three weeks?

A. Three or four weeks, four, I guess, anyhow.

Q. All right. During the four weeks that you had worked in that stope, you had gone up this west man-way, didn't you?

A. Yes, I went up that man-way.

Q. Now, which side of the ore chute was the timber slide?

A. Behind the ore chute.

Q. Which is behind? Was it on the west side or the east side?

A. The west side is behind.

Q. And the timber slide extended from the sill floor clear to the fourth floor, didn't it?

A. Yes, clear up to the third floor, you know; the fourth floor was filled up with muck.

MR. GRAY: Where was that timber slide?

MR. WAYNE: He says it was west of the ore chute.

A. It was behind the ore chute, behind the slide chute, you know, here.

(By MR. WAYNE.)

Q. Let me see if I understand you. As a matter of fact, didn't that timber slide come clear to the fourth floor?

A. He come to the third floor, the timber slide.

Q. And didn't go to the fourth floor?

A. No, it can't come up when the muck pile was up on the fourth floor.

Q. You mean to say the timber slide only came as far as the third floor?

A. Yes.

Q. That timber slide was provided with some sort of a hoist apparatus, a hand hoist, wasn't it?

A. Yes.

Q. And the rope had a chain on the end for fastening objects which you wanted to hoist up or down, didn't it?

A. I couldn't use that hoist.

Q. I haven't asked you whether you could use it or not. There was a chain on the rope?

A. Yes, there was something on the rope there.

Q. Did you used to bring your steel up yourself?

A. Yes sir.

Q. How did you bring it up? Did you carry it up?

A. Yes.

Q. Or bring it up in the timber slide?

A. I carried it.

Q. Had you taken this drill up yourself?

A. Oh, yes, every time.

Q. How would you bring the drill out?

A. Yes, I carried it on my shoulder.

MR. GRAY: That is an Ingersoll hammer drill?

A. Yes sir.

(By MR. WAYNE.)

Q. How much do they weigh?

A. I ain't sure, but I think they weigh about 75 pounds, something like that; I ain't sure.

Q. What was the matter with your drills?

A. Oh, he was out of order, he was leaking, and I couldn't make the hole. I was working with him for an hour, and he don't make no hole; he don't have no power.

Q. Isn't it the custom in the mines in which you have worked, including the Gold Hunter, whenever there is anything the matter with your drill, and you want to send it down to the level, to have the carman come and get it and take it down?

A. No, I didn't have no orders on the carman there.

Q. Hadn't you, as a matter of fact, been told by Steve Shaw that any time you wanted steel, or any time there was anything the matter with your drill, to have the carman come and either take it down himself or help you take it down?

A. Well, he won't let—give me the carman to help me up there. It was my orders to take the steel up to the top, you know.

Q. Hadn't Steve Shaw told you that?

A. No.

Q. Isn't this carman simply a spare hand there who is supposed to wait on you in such matters as that?

A. No, the carman don't have nothing to do with me, you know. He don't have—he only runs the car and empty the chute, and muck out the chute.

Q. That particular carman helped to do the mucking, did he, too?

A. He don't help me. I didn't use him.

Q. You have mentioned a nipper that was working there. What are the duties of a nipper?

A. Nipper, he take the steel down, and then he take the orders for the powder, how much powder a miner needs.

Q. Has he no duty in regard to a machine being out of order?

A. I don't know anything about that.

Q. Had you ever had occasion before to take down a machine and take it down to the level for repairs?

A. I don't understand.

Q. Had you ever wanted to take a machine down from where you were working to the level before that night?

A. No, I never took my machine down from that place at all.

MR. GRAY: He doesn't understand.

(By MR. WAYNE.)

Q. If you wanted to take your machines down, as you say you did, you could have called on the nipper to take it down for you, couldn't you?

THE COURT: Why didn't you call the nipper to help you take your machine down?

A. The nipper only comes around once or twice a shift, you know, he went by me already in there, but just the time he come, if you need some help me out, but he wasn't around there any more, and if I started to wait for him I have to wait all night, and stay there and wait all night.

(By MR. WAYNE.)

Q. How long had you been working on this shift before your drill became out of order?

A. Oh, about two hours, I was working there.

Q. Now then, you say the night before you were injured was the first time you ever went over this plank?

A. The night before?

Q. Yes, the night before you were injured.

A. Yes, but I don't remember that I been gone that way before.

Q. You had been going up the ladder from the second to the third floor before?

A. Yes, when I was working on it I was there all the time, when I worked the ground out, and there was lots of muck there.

Q. And even after this ladder was partially broken you had still continued to use it, hadn't you?

A. So long as I had the ladder there I went that way, you know.

Q. Had this plank been in that place before the ladder was broken?

A. I don't know. When the ladder was broken I found out that plank, you know.

Q. How did you find out about that plank?

A. There wasn't no chance to go the other way, you know. I was looking around there, and I went over that way, and I found the place, found the plank over there, and I went that way.

Q. Was the plank in place from the ground to the cap at the time you first saw it?

A. Yes.

Q. Do you know who put it there?

A. I don't know that.

Q. Did anybody tell you it was there?

A. No, I was the first man going up to the stope, you know.

Q. You just went and found it?

A. Yes; I couldn't get up—I started to look for a way to get up there.

Q. That was an ordinary lagging such as was used in that mine, wasn't it?

A. Yes.

Q. Six feet long?

A. Around six feet, I guess; I don't know just—but I think it was about six feet.

Q. Eight inches wide?

A. Around there—I didn't measure it, but it looked like an eight inch plank.

Q. Do you know whether or not the upper end of it was nailed to the cap?

A. No, I don't know that.

Q. You never examined it to see?

A. No, I didn't see it.

Q. And there was a wall of how much from the upper to the lower end?

A. The floor, you mean?

Q. The fall, the lower end was how much lower?

A. Oh, it was like this, you know,—I think it was about two feet and a half, like that, the lower end, you know, and the upper end.

Q. How many times had you gone over the plank before you were injured?

A. I don't know that. I went quite a few times, you know; I had to go up and down there to get the steel and—

Q. There were no lights at that place, were there?

A. How?

Q. There were no lights at that place?

A. No.

Q. You simply used your candle?

A. Yes.

Q. Had you ever gone up the west man-way to the third floor, and then over to the east man-way, and up the ladder to the fourth floor?

A. What do you mean—ever gone up—

Q. Have you ever gone up that way?

A. Oh, yes.

Q. Now, these ladders, Mr. Johnson, that they used there, they are all the same length, aren't they?

A. Yes, about the same length, I guess.

Q. What are they, ten foot ladders?

A. I don't know—about that.

Q. And they keep those ladders down on the level ready to take to any portion of the mine and use don't they?

A. Sometimes they have a ladder on the station and sometimes not.

Q. Now, this broken ladder was in such condition that it couldn't be repaired, as I understand you, was it?

A. I don't know. I don't understand what repair means.

Q. This ladder between the second and third floor was all broken, was so broken that it couldn't be repaired, couldn't be fixed?

A. Yes, it was all broken up.

Q. They had to put in a new ladder?

A. Yes.

Q. How long would you say it would take them to get that new ladder and hoist up there and put it in place?

A. Well, if they had the ladder on the hoist it wouldn't take very long.

Q. Just a few minutes, a matter of a few minutes?

A. Yes.

Q. They had the ladders there ready made, ready to use?

A. No. At that time there wasn't no ladder on the whole place there. I couldn't see no ladder no place.

Q. By the whole place, what do you mean?

A. The whole stope. And not any on the station either.

Q. How long was this stope?

A. I don't know how long it was.

Q. Between sixty and fifty feet, wasn't it?

A. Oh, I guess it was.

Q. And the cage went up right at the east end of the stope, didn't it? The cage in the shaft was within a few feet of the east end of this stope?

A. Yes, I think it was part of the shaft from the east end of the stope.

Q. And they had ladders on other floors, didn't they, ready to use?

A. I don't know that—not on the floors, but they may be had other ladders, I don't know that because I was working on that level.

Q. Between the east and west man-ways how far was it, about how many feet?

A. Well you know the stope he was pretty long, and the other one was—the west man-way was just the end of the stope, the west end.

Q. And the east man-way was—

A. A little further, you know, from the end.

Q. Three or four sets? t

A. Four or five sets, like that, I think.

Q. The two man-ways weren't any further than about thirty feet apart, were they?

A. Yes, about forty feet, I guess.

Q. About forty, you think?

A. Yes, I think. I don't measure it, just look at it.

Q. Did you help make this map here?

A. No.

Q. You didn't?

A. No.

Q. Were you present when it was made?

A. How?

Q. Were you with Mr. Holmi at the time when he made it?

A. I was over there when he made that, but I didn't made that.

Q. Did you tell him how to make it?

A. No.

Q. You didn't?

A. I can't make that kind of a map.

Q. Did you talk to him as to how it should be made?

A. I don't talk anything else, but I told him to make that out how the place was.

Q. You did tell him how the place was?

A. I didn't tell him, but I told him to make that map how he understand the place, you know.

MR. WAYNE: That is all.

MR. GRAY: That is all, I think we will rest, but it is after twelve, and can't we have until after lunch to determine whether or not—

A recess was taken until 2 p. m.

EDWARD JOHNSON, RECALLED.

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Johnson will you tell the jury how your health was, before this accident, this injury?

A. My health was good always; I was a strong, healthy man.

MR. GRAY: Mr. Wayne, will you agree that the expectancy tables, the American Tables of Mortality,

show that the average expectation of life of a man thirty-three years of age is 32.2 years?

MR. WAYNE: We admit that the American tables of mortality show that.

(By MR. GRAY.)

Q. Mr. Johnson, just one other question. Just tell the jury whether at any time prior to your injury you told Mr. Holmi about this way up the plank as a way to get up to the place of work?

MR. AILSHIE: I object to that as incompetent, irrelevant and immaterial, and it has reference to his own witness a conversation with his own witness.

MR. GRAY: They brought out by Holmi that either Johnson or the nipper, or some other man, told him about this way to go. And I wanted to know whether—

THE COURT: Objection sustained.

MR. GRAY: That is all.

MR. WAYNE: This is not directed to your present examination, Mr. Gray, but—

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. This slide chute had been built or re-built the night that you was injured, had it not?

A. It was being before.

Q. But there was one which had become out of repair or been broken by rocks and dirt, and this one was rebuilt on the night that you was injured, before your injury, was it not?

A. No, I don't remember. When they made that

they blast a hole up the top floor, and then she get broke, one place.

Q. Didn't Holmi and Pellecier rebuild and repair this slide chute the night you were injured?

A. No.

Q. Do you know whether they did or not?

MR. GRAY: You mean before his injury?

MR. WAYNE: Yes, before the injury.

A. No, they don't build it that night I was hurt; it was a few nights ago that it was builded.

(By MR. WAYNE.)

Q. A few nights before?

A. Yes.

Q. Now, Mr. Johnson, you spoke about this slide chute taking up all or nearly all of the space between the new timbers and the top. Isn't it a fact that it came down in a sort of a funnel shape, so that at the place on the third floor where it went into the straight chute it was only two or two and a half feet wide?

A. I don't understand. I would like to have a man that can talk. I can't understand.

Q. I will ask it differently then. This slide chute was narrower at the bottom than it was at the top, wasn't it?

A. The same kind of a plank, you know, it is no narrower; it is the same one end as the other. It is the same wide at each end.

Q. I don't mean the plank, but I mean the entire width of the chute; it was narrower at the bottom than it was at the top, wasn't it?

A. No.

Q. Wasn't it made narrower and shaped something like a funnel at the bottom, so that the rock and the ore as it came down would hit near the center of the chute, instead of going over the side?

A. The side chute is made on the level, you know, straight down the slide chute, you know.

Q. Then you mean to tell the jury that it was the same width at the bottom and at the top?

A. It was the same wide from the bottom and from the top, but just on the ends I don't know, but it looked the same anyhow.

Q. Had you ever seen the slide chute?

A. Oh yes.

Q. When was the last time you noticed it before you were injured?

A. I see the slide chute when she was built over there.

Q. That was about four nights before, I guess, four or five, I don't remember, four or five nights ago, I think it was four nights.

MR. WAYNE: That is all.

(By MR. GRAY.)

Q. Had you seen it after that and before you were injured, Mr. Johnson, after four nights before did you see it the night you were injured, or the night before that, or the night before that?

A. Yes.

Q. Which night did you see it?

A. I seen it on the third night, he was there, the third night before I got hurt.

Q. Did you see it after that?

A. Yes, after that always.

Q. Just tell the jury—

A. I seen it when I came up from the drift, when I came up I used to look over there all the time if there was any chance to go through there, but there wasn't any chance to go through when the slide chute was over there.

Q. Now, I don't know whether that is clear. When was it when you went up that you say you saw it from the drift, what night?

A. Three nights before I got hurt.

Q. Did you see it after that and before you were hurt?

A. Before I was hurt, you know.

Q. Yes, after three nights before?

A. Yes.

Q. In other words, did you see it the night you were hurt?

A. Yes, the night before, and the third night I seen it there.

MR. GRAY: That is all.

RE-CROSS EXAMINATION.

(By MR. WAYNE.)

Q. How far was this slide chute on the third floor from the ladder in the east man-way?

A. The east man-way, you see the east man-way was on the second floor.

Q. And as you went up you only had your candle, that was the only light you had?

A. Yes, only a candle.

MR. WAYNE: That is all.

MR. GRAY: That is all.

JOHN HOLMI, RECALLED.

(By MR. GRAY.)

Q. Mr. Holmi, something was said this morning about a timber slide, do you remember that?

A. Yes.

Q. Did that timber slide come up to the fourth floor? How high up did it come?

A. The first night, I was behind that slide in the west end.

MR. WAYNE: I don't think that is responsive to the question. He asked how far it came up.

(By MR. GRAY.)

Q. Just tell when you saw it and how far it came up, and all about it?

MR. WAYNE: I object to the form of that question, if Your Honor please.

A. And I don't remember this timber slide that time. May be I saw it, may be not. But this wasn't open here, the third floor.

(BY MR. GRAY:)

Q. Tell the jury if it extended up above the third floor, to the fourth floor, do you understand?

A. I guess not.

Q. Did the timber chute, the timber chute or timber slide, whatever you call it, come up to the fourth floor?

A. No.

Q. The night of the accident, was it up that high?

A. No. I never was up there before — afterwards.

Q. But at the time of the injury, the night you

were working there, did it come up to the fourth floor then?

A. No, not possible.

Q. One other question about this slide chute. How about that, what was its width at the bottom here compared with its width up here at the top?

THE COURT: Was it smaller at the bottom or the same size?

A. The same size.

MR. GRAY: That is all.

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, just a question. The foot wall side of this slide chute was straight, wasn't it?

A. What side is the foot wall side?

Q. Well, don't you know which was the foot wall side and which was the hanging wall side? Mr. Holmi, there was one side of this slide chute that was straight, wasn't there?

A. Yes sir.

Q. And the other side came in a slanting direction to form a sort of a funnel at the bottom, isn't that right?

A. Yes sir.

Q. And at the bottom of that sort of a funnel the slide chute was only about two feet or two feet and a half in width, wasn't it?

A. It was more.

Q. Well, how much more?

A. It was about three and a half.

Q. About three and a half?

A. Yes.

Q. And it was built that way for the purpose of preventing the rock and dirt as it came down from going over the side of the straight chute, isn't that a fact?

A. I don't understand.

MR. WAYNE: That is all.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, didn't you help rebuild that slide chute the night that Johnson was injured?

MR. GRAY: Before or after?

A. For whom?

(By MR. WAYNE.)

Q. I don't care for whom.

A. Yes, I helped. I built that slide chute with the carman.

Q. You and Pellecier built it?

A. Yes sir.

Q. You repaired it and fixed it up the night that Johnson was hurt, didn't you, before he was hurt?

A. We did that slide chute the first night I was working in the stope.

Q. Afterwards it became out of repair and you fixed it up new again on the night that Johnson was hurt, didn't you?

A. No. That slide chute we—

Q. What was your answer to that? You say no. It had only been used—

A. Only that slide chute. What we built the first night was used all the time I was in there, and no other one was built.

MR. WAYNE: That is all.

MR. GRAY: That is all. We rest.

R. E. CARRY, a witness, duly called and sworn on behalf of defendant, testified as follows:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. State your name?

A. R. E. Carry.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your occupation?

A. Surveyor and assayer.

Q. By whom are you employed at the present time?

A. The Gold Hunter.

Q. Have you made a map or maps showing the west stope of the 400 foot level of that mine?

A. I have.

Certain plats were thereupon marked: Defendant's Exhibits 1-A to 1-G, inclusive.

(By MR. WAYNE.)

Q. Mr. Garry, defendant's exhibits 1-a, 1-b, 1-c, 1-d, 1-e, and 1-g, are the various maps you have made?

A. Yes.

Q. Now, what does this exhibit 1-a represent, Mr. Garry?

A. It represents the condition of the stope November 1, 1914, that is the closest record we have.

Q. And exhibit 1-b what is that?

A. That represents the condition of the stope at the time of the accident.

Q. And that is constructed on the same plan as the plaintiff's exhibit, 1—is it not, showing one floor above the other, a sort of a cross-section, isn't it?

A. His runs east and west, and that is the other way, that is all.

Q. And 1-c, 1-d, 1-e, 1-f and 1-g are the floor maps, are they not?

A. Yes sir.

Q. And show simply the shape of each floor as it was mined out?

A. Yes.

Q. That is right, is it?

A. Yes.

Q. Now will you indicate upon this map the directions west and east, so that we may know?

A. This is west.

Q. You had better mark it.

(Witness places letters E. and W. on map.)

Q. Have you indicate dupon this map what has been called here the west man-way?

A. I have.

Q. How is that indicated?

Q. These hatched lines?

A. The straight lines with the little dashes on the side of them.

Q. On the west end of the map?

A. On the west end of the map.

Q. That is the west man-way?

A. Yes.

Q. And you have marked the timber slide or ore chute?

A. Yes.

Q. And the other ladders at the east end represent what has been called here the east man-way?

A. Yes.

Q. Now, where did you get the information from which you drew in the red lines which you have called the plank?

A. That was from Shaw and Ashland.

Q. You didn't know as to the correctness of that?

A. No.

MR. WAYNE: I offer these maps simply for illustrative purposes:

MR. GRAY: Not as tending to be an accurate survey or anything of that kind?

MR. WAYNE: Except as we will point it out by the evidence. Yes, Mr. Gray, so far as floors are concerned, it does represent an accurate survey, but as to the position of the ladder at the east end, nor the plank.

MR. GRAY: I certainly object to the first one, Exhibit 1-a. It is perfectly evident that considerable work must have been done there subsequent to the injury and before that map was made.

MR. AILSHIE: I suggest that this was an actual survey made by this man at this time.

MR. GRAY: You have already asked him and

he said it was November 1st, and there are five or six floors there.

MR. AILSHIE: November 1st is very close to the date of this occurrence.

THE COURT: With that explanation, I can't see that the jury would be misled.

MR. WAYNE: The evidence is that it was open only to the fourth floor at that time.

MR. GRAY: I object to Exhibit 1-b for the reason that it pretends to be a survey, but it isn't shown when it was made, or where he got the other information than that derived from the witness Shaw with regard to the plank.

THE COURT: Perhaps you had better ask him from what sources this information was derived, and how these maps were made up.

MR. WAYNE: From what sources did you get the information from which you made the maps 1-b to 1-g, inclusive?

THE COURT: Now, excepting the plank that you have referred to, and the ladders.

MR. WAYNE: The ladders at the east end.

A. The maps is all accurately measured from the condition of the ground at this time, where there has been no work done below this fourth floor, and it is the same as it was at the time of the accident. The only thing that was taken from Shaw was the position of two or three ladders and the plank.

(By MR. WAYNE.)

Q. Which two or three ladders were they?

A. These two ladders on the east man-way.

Q. The two ladders on the east man-way?

A. That wasn't a permanent man-way, so the ladders are not in.

(By MR. WAYNE.)

We renew our offer now.

MR. GRAY: I renew my objection.

MR. WAYNE: Take the witness.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. When did you make the survey from which you made these?

A. On the 26th day of last month.

Q. The 26th of April?

A. 26th of April.

Q. You are in the employ of the defendant company, are you?

A. Yes, sir.

Q. Are any of those ladders in the same position they were on the day of the accident?

A. Some of them. Yes.

Q. Which ones, from your own knowledge, I mean?

A. These two are in the position.

Q. That is the lower two on the west man-way?

A. Yes. And this one.

Q. The upper one?

A. The third floor has been moved.

Q. On the west?

MR. AILSHIE: If Your Honor please, I want to enter an objection to counsel repeating and inter-

preting the evidence of the witness. I insist that the question be asked so that the witness can answer.

THE COURT: That is in a measure true. The difficulty about it is that you have produced here very small maps, and the jury is having some difficulty in understanding what the witness means by his answers, as I am. If you will stand up before the jury as you explain this map, and explain it to them just as you would to some one in your office, and explain it in such a way, Mr. Witness, that the reporter's notes will show what you mean.

MR. GRAY: Now, then, show the jury now and describe the ladders that are in the same position?

THE COURT: It is unfortunate that you didn't have a larger map made, gentlemen.

MR. GRAY: Just explain if you can, what ladders were—

A. The ladder from the sill floor to the first floor is in the same position it was at the time of the accident.

Q. You are referring to the west man-way?

A. The west man-way. The ladder from the first to the second floor is in the same position that it was at the time of the accident. The ladder from the second to the third floor has been moved, but the position of the ladder is shown by the hole in the floor above.

Q. Where is the hole on the map?

A. In the third floor.

Q. Does the hole show on the map?

A. The hole doesn't show on the map.

Q. May I ask how you know those two lower ladders are in the same position?

A. Because I saw them.

Q. Saw them then?

A. Saw them, not at the day, but they have been there before and after the accident.

Q. Are they the same ladders, or have they been replaced?

A. They may have been renewed.

Q. All right.

A. This ladder on the east man-way from the sill to the first floor is not there now. From the first floor to the second floor is not there now, and from the third floor to the fourth floor is not there now.

Q. What is this other one you have got over here, away over in the breast from the second to the third?

A. That was a ladder from the first into the second that was in at the time of the accident.

Q. How do you know?

A. I don't know—

Q. You don't know from your own knowledge?

A. No.

Q. Now, this 1-a, after the accident there was considerable work done in that stope before you again surveyed it?

A. It was thirteen days after the accident, and they had taken out some ground.

Q. Is any other of it—is the ore chute or the inclined chute an actual survey?

A. The ore chute is an actual survey. The inclined chute is not in here.

Q. You never did survey that? It is just put in to indicate where it was?

A. Yes.

Q. These floors from there on, when did you make the survey of those?

A. Those floor maps were made on the 26th.

Q. Of what month?

A. Of May.

Q. Of this year?

A. Yes.

Q. And where you show ladders and chutes, etc., it is as they were at the time you made your survey this last month?

A. With the exception of those ladders which—

Q. I mean on these floors now, and you have shown some ladders on the floors here. Those represent the conditions as they were when you made the survey the other day, or as Mr. Shaw and these men tell you it was there last fall.

A. They represent the position of the ladders as shown—

Q. In 1-b?

A. On 1-b.

Q. And do not pretend to represent a survey of the ladders last month?

A. No.

Q. The only thing that you do vouch for is the outline of those floors when you made the survey last month?

A. Yes.

MR. GRAY: That is all.

MR. WAYNE: That is all.

STEVEN SHAW, A WITNESS DULY CALLED AND SWORN ON BEHALF OF THE DEFENDANT, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. AILSHIE:)

Q. What is your name?

A. Steve Shaw.

Q. Where do you reside?

A. Mullan, Idaho.

Q. How long have you lived there?

A. Three years.

Q. Where are you employed?

A. The Gold Hunter Mining Company.

Q. How long have you been working there?

A. Going on close to two years.

Q. Were you working there last October, during the month of October?

A. Yes, sir.

Q. What position did you occupy there at that time?

A. Shift boss.

Q. Were you working there at the time the plaintiff was hurt?

A. Yes, sir.

Q. You knew him?

A. I knew him, yes, sir.

Q. How long have you known him?

A. I have known him about—oh, pretty close to two years.

Q. Has he been working there ever since you have been working there?

A. Yes, sir.

Q. Was he working under you on the night that he was hurt?

A. Yes, sir.

Q. When did you see him immediately before he was hurt?

A. About, I should judge, from a half to three-quarters of an hour, probably an hour, somewheres in there.

Q. Where was he when you saw him last?

A. On the fourth floor in the west 400 stope.

Q. What was he doing?

A. He was getting ready to go to drilling.

Q. I wish you would look at this plaintiff's exhibit 1 here and state if you can point out from it where he was at work. Now, he states that this is the east end and that is the west end of the stope. Now, if this is the east end and that the west end, about where would he have been working?

A. This is the east end?

Q. Yes.

A. And this is supposed to be the top floor, is it not?

Q. Yes, if this is the top floor?

A. And this is the west end?

Q. Yes.

MR. GRAY: It is just reversed from what it ought to be.

MR. AILSHIE: They put the west end in as east on this map.

Q. I have got to reverse it then?

A. Yes. Have you seen this exhibit?

A. This here, this map here, this is the west end, you understand?

Q. Yes.

A. This is the east end. This represents going to the shaft. This was on the sill, what we call the sill.

Q. Which would be the sill floor on this exhibit?

A. This one here.

Q. This one here?

A. Yes.

Q. Follow up now to where he was working?

A. He was working right in here.

MR. WAYNE: You had better have the record show that.

Q. What floor would that be on?

A. That would be on the fourth floor.

(BY MR. AILSHIE:)

Q. What was he doing at the time you saw him?

A. He was building a platform here to get ready to go to drilling.

Q. Who was with him?

A. John Holmi, was on the west side of him.

Q. Now, at that time, how long did you remain where they were working?

A. Oh, probably five or ten minutes.

Q. Then where did you go?

A. To the six hundred, what we call the six hundred level.

Q. When did you learn of his injury?

A. About a half an hour after it happened, after he went out.

Q. Where did you learn of it?

A. I was at the top station.

Q. What did you do then?

A. I went directly back down to the four hundred.

Q. Did you send anyone to take his place?

A. Yes, sir.

Q. Who?

A. George Ashland.

Q. Did you go to the place where it was represented that the accident had occurred?

A. Yes, sir.

Q. What did you find there?

A. Well, I found the machine there, and John Holmi back in the place where he was to work, and the machine down on the second floor at the east end of the stope.

Q. Will you point out on that—better do so on this one—where the machine was?

A. Right in here, the second floor.

Q. Did you send anyone to get the machine?

A. I did.

Q. Whom?

A. George Ashland.

Q. Then what did you do? Where did you go then?

A. I went on back down to the lower workings.

Q. Did you examine the place where it was he claimed he was hurt?

A. Yes.

Q. What did you find there?

A. Well, I found a plank from the cap over to the ground.

Q. Point that out, if you can, on this map, defendant's exhibit 1-b, the plank that you found where he was hurt.

A. Right at the east end here from the third floor down to the end of the stope, not quite to the second, you see; it goes between the two floors. You can see the slant.

Q. Had you ever seen that plank there before?

A. No, sir.

Q. Had you ever been over it?

A. No, sir.

Q. Describe to the jury the way that plank, the position it was in, and the condition of the wall of the stope at that time?

A. That plank was from two feet to two foot and a half higher at one end than at the other, from the timbers down to the ground. Where it was on the timber, what he call the cap, the plank was two foot higher or two and a half, than it was on the ground, and that left it laying on a slant to the ground.

Q. Describe the ground, or the wall of the stope where it lay, or the ledge it lay on.

A. The wall of the stope, the end of the stope going east, as we come across on the floor here, there is always a little ore left, and that is taken out, and that is because of this what they call the bench at the end of the stope.

Q. What is the practice and the custom in that

mine, or in mines, running the floor and putting in the bents, with reference to filling up to the wall?

A. When there is room for a set we put it in; a set is six feet apart, between the caps, between the center of caps.

Q. It is the custom and practice to keep that filled in until there is a sufficient space for a full bent?

A. Yes, sir.

MR. GRAY: I object to that as leading and suggestive.

THE COURT: I think he may answer.

(Last question read.)

MR. AILSHIE: I meant set.

THE COURT: Perhaps you had better repeat that question. I doubt whether he understood it.

(BY MR. AILSHIE:)

Q. Was it the custom and practice in the mine, or is it the custom and practice in the mine, to put in additional timbering or floor until you have run for a full set?

A. No, it isn't the practice until we have run for the full set.

Q. In other words, then, you work out until you have run for a set, and then put it in?

A. Yes, sir.

Q. This space, was it wide enough or large enough for a set, where this piece was?

A. No.

Q. Did you go over that place that night after you examined it, that board?

A. Yes, at the time I examined it, yes.

Q. Did you go over it ascending or descending; did you pass over it going up or coming down?

A. I passed over it coming down.

Q. State how you went through the mine or through that stope that night, the direction and course you took, after you discovered that this accident had occurred.

A. THE COURT: You mean you came down over this after the accident?

A. Yes, sir. Well, I got off the cage at the 400 level. I goes west in the drift to the west man-way. I goes up to the third floor, and crosses over the third floor east to this plank; then I goes down the plank to where the machine was.

Q. In going across on this third floor, how did you travel? Taking plaintiff's exhibit 1, and suppose that this was the third floor here, that I point out, it is not marked at all—that is, as to which floor it is—but supposing this were the third floor here, how did you pass along here?

A. I came up this way and passed by here.

Q. How did you get by this ore chute?

A. Walked by.

Q. Describe the condition, and the opening there was there.

A. There was about two foot or two foot and six inches.

Q. In width?

A. In width.

Q. Between the wall and the—

A. Between the wall and ore chute.

MR. GRAY: I object to these leading questions.

THE COURT: Yes, avoid leading questions.

(BY MR. AILSHIE:)

Q. Now, state the size of that opening, both as to width and height, describe it.

A. Well, sir, at the bottom—you mean from the ore chute to the wall?

Q. Yes, between the ore chute and the wall.

A. The bottom was about two foot and a half, and the top wasn't so much; it was narrower at the top, probably eighteen inches.

Q. Any difficulty in getting through there?

A. No, sir.

Q. Now, describe the ore chute to the jury.

A. This here slide chute—

Q. I mean the slide chute.

A. Goes in at the top of the ore chute on the third floor, extending from the fourth floor, which means this floor up here, and to shovel into this slide chute, instead of throwing it back and down through this way, it was closer and handier to the shovels, so they put it into the slide chute, and it runs down and into this ore chute from the slide chute.

Q. How wide was the top of that slide chute?

A. The top of that slide chute was probably three foot or three foot six.

Q. How wide is the bottom of it where it goes to the ore chute?

A. About two feet or two feet three.

Q. Then there is about how much difference between the top of the ore chute where it rests on the tie above, or cross piece?

A. About a foot.

Q. And the bottom?

A. About one foot.

Q. And the slide chute was about a foot narrower at the bottom than at the top?

A. Yes, sir.

MR. GRAY: I object to that as leading and testifying and suggestive.

THE COURT: Yes, it is leading.

MR. AILSHIE: It is very easy to contract bad habits, and I fear I have done it already from counsel.

(BY MR. AILSHIE:)

Q. Mr. Shaw, where did you go after you passed by this ore chute? How did you travel then on that slide chute, I mean?

A. Coming back or going?

Q. As you went back.

A. I don't understand.

Q. After you came on to that floor and passed by the slide chute, then in which direction did you go, and where did you go from there, from the third floor?

A. As I was going to where this accident was?

Q. Yes.

A. Well, I came over to this east end—this represents the east end—I goes down here, and they explained where it happened, and come down to the second floor, here, of which I have already told you, over that plank.

Q. State, if you know, when that slide chute was

made there or repaired, or anything of the kind that was done to it.

A. That slide chute was made about two shifts before this accident.

Q. By whom?

A. By the shoveler and the carman.

Q. Who were they?

A. John Holmi and Joe Pellechier.

Q. How long before the accident, about, would you say?

A. Two shifts.

Q. Two shifts before?

A. Yes, sir.

Q. What time would that have been in the day, or what day would it have been?

A. I couldn't tell what day it was. I could tell about the day of the month, but I couldn't tell what day it was.

Q. How many shifts do you work in the mine in twenty-four hours?

A. Two shifts in 24 hours.

Q. Now, do you mean this was done the second shift in continuous order or the second shift preceding that they worked.

A. The second shift on our shift. That would be two shifts for us.

Q. What was the usual way of going from the ground floor or the third floor up to the place where the plaintiff was working that night?

A. Up the west end.

MR. GRAY: The usual way for him or—

MR. AILSHIE: For anyone working in that mine, what was the way for them to go?

A. The west end, the west man-way—

(BY MR. AILSHIE:)

Q. Describe now the way they would go on that map, point out.

A. We would come up first on the first floor, from the first to the second, and then from the second to the third.

Q. Indicate those places. What do you mean to indicate by those?

A. These are the ladders, man-ways.

Q. Then how would he travel from there?

A. He would have to—I don't really understand this map here. He would have to go to this end—

THE COURT: Can't you go ahead and tell?

MR. AILSHIE: This map is turned the other way.

A. He would have to go east from the third floor past this timber slide in here. He hasn't got it represented. And come over these ends—the ladder is here—went in behind where they were drilling, taking out the ground, this ladder here. This isn't a permanent ladder, this ladder. And after this set was put in on the west end this ladder should have been moved over here in a permanent place.
moved over here in a permanent place.

Q. That is after—

A. After it was timbered and the muck off of the floor above here.

Q. Now, taking this map here that you are ac-

customed to, will you point out the course that miners took in going to the places where these two men were working, the plaintiff and Holmi, that night?

A. This is the direct course, up this west sill here, this west man-way.

Q. State whether there were ladders there at the places indicated on this map, defendant's exhibit 1-b?

A. Yes, sir, there was ladders there.

Q. On the night of that occasion?

A. Yes, sir, there was ladders there.

Q. As indicated there?

A. Yes, sir.

MR. WAYNE: In the west man-way?

A. Yes, sir. They was there as indicated there.

(BY MR. AILSHIE:)

Q. How would he go from here when he reaches the third floor?

A. He would come east to this ladder over here.

Q. What is this? What does it represent here where it says "ore chute?"

A. This represents the rock chute, that they put the ore in from the stope.

Q. What is this, that is called "timber slide?"

A. This is timber slide, to take the timbers, steel, machines, anything they wish.

Q. State to the jury what that was used for at that time.

A. It was used to take timber up, machines, anything to go up that was necessary to go.

Q. State by what means you would take anything up and down, for instance, machines?

A. To save carrying it up on our shoulders.

Q. How would you get them up, elevate them?

A. There was a winch there at this time that extended to the third floor. This here wheel, that the rope went through, was up on the fourth floor, but the slide comes to the third and was taken up to third floor on this winch.

Q. What was the instructions to workmen with reference to taking tools and machinery and so on that they were working with up and down? Did they carry them up and down by way of the ladders, or did they take them in some other way?

MR. GRAY: I protest, Your Honor.

A. They have taken them both ways, but the instructions was to take them up this winch, timber slide.

(BY MR. AILSHIE:)

Q. Now then, from this point where would he travel in going to the place where he was working?

A. He would travel east.

Q. From the time he reached the third floor?

A. Yes, sir. Travel east to this man-way here, or this ladder, and then he would go up on the fourth floor here, to where he was working.

Q. State what the condition was at the time you passed this ore slide with reference to there being much ore rock or anything of that kind about it.

MR. HANSON: When, please?

MR. AILSHIE: Just state at the time he went by there at the time of the accident.

A. She was clean, all right, here at the time I went by, after the accident and before the accident.

(BY MR. AILSHIE:)

Q. How was it after the accident?

A. She was still clean.

Q. State what this represents on the third floor at the east here?

A. This represents a ladder from the third floor extending on up to the fourth floor.

Q. State whether or not that ladder was there that night.

A. Yes, sir.

Q. Whether or not it was there before the plaintiff went to work?

A. Before the plaintiff went to work?

Q. Yes.

A. It was there when I came through that night. As to whether he put it up there that night, or someone else—

Q. How long had there been a ladder there?

A. Every night, every day. This ladder is moved as they move the dirt back sometimes.

Q. In which direction were they working in drilling and mucking on the fourth floor?

A. They was going east, making a cut through new rock west.

Q. They were working—

A. Coming east on the cut, yes sir.

Q. Were you present, and did you hear the testimony of the plaintiff with reference to a conversation he had had with you?

A. Yes, sir.

Q. About a broken ladder, and his traveling to his floor over this plank?

A. Yes, sir.

Q. State if you ever had any such conversation with him.

A. No, sir.

Q. State whether or not he ever made any complaint to you.

A. No, sir.

Q. About it?

A. He did not.

Q. State whether or not you were aware that he or any other workman under you were traveling up and down over this plank?

A. Why, they travel—I didn't know anything of this plank until after the accident.

Q. Then, at the time of the accident, or at the time you went on duty that night, were you aware of their going up and down that way?

A. I knowed they had went that way.

Q. Did you know how they had gotten up or down?

MR. GRAY: I object, if Your Honor please, as leading.

THE COURT: No, that isn't leading. The objection is overruled.

A. No, sir.

(BY MR. AILSHIE:)

Q. State what the purpose was of this so-called east man-way in this stope?

A. The so-called east man-way was for the purpose of coming to this rock chute on the east end, to come up on the first and second floor, from the first floor as high as the chute came.

Q. Explain to the jury how a stope like that is worked, that is, whether it is worked up or down.

A. It is worked up.

Q. So the first thing that was worked out was down where the sill floor is, and on up that way?

A. Yes, sir.

Q. Now, I will ask you about two indications on this defendant's exhibit 1-B, of two ladders on the sill and first floor to the east end. What was the purpose of these?

A. The purpose of those was to come up for the purpose of this chute in here, muck on this east end.

Q. In what way did you manage to clean the ore chute if at any time it was—

A. Well, we would have to have a mill hole here, a hole into the chute.

JUROR: Let him use the other map. We can see that lots better than this.

(BY MR. AILSHIE:)

Q. On this map marked plaintiff's exhibit 1, where would the line marked "plank" on defendant's exhibit 1-B be, can you point it out?

(Witness did so.)

Q. It would be on what is marked the east end of this map here?

A. Yes, sir.

MR. AILSHIE: I don't know whether it is—

MR. GRAY: Yes, it is marked east and west, Judge.

MR. AILSHIE: That is all.

CROSS EXAMINATION.

(BY MR. GRAY:)

Q. Now, you knew there was this broken ladder between the second and third floors, didn't you?

A. No, sir.

Q. You didn't know that?

A. Not at this time, no sir.

Q. When did you first discover that?

A. Because there wasn't no ladder between the second and third floor?

Q. Could you tell the jury when you did discover it?

A. There was no ladder there.

Q. There was no broken ladder there?

A. Not on the second and third floor.

Q. Between the second and third?

A. No, sir.

Q. Now let us take this little map that you have been using.

A. Yes, sir.

Q. What is this ladder shown over in the east breast there, laying up against the breast, and running up to the bench?

A. I couldn't tell you what it was laying here for.

Q. When was it laying there?

A. This was on the second floor.

Q. I asked you when it was lying there.

A. It is lying there at the present time.

Q. Was it at the time of the accident?

A. I couldn't—

Q. Didn't you tell the surveyor who made this that it was lying there at that time?

A. No, sir. This is the second floor and this is the third floor.

Q. And this ladder lying there up to the bench, was that there at that time?

A. No, sir.

Q. It was not?

A. No, sir.

Q. You know when it was put there?

A. No, sir.

Q. Now, the ore chute was how—

MR. AILSHIE: Will you indicate on that how—

(BY MR. GRAY:)

Q. Laying against the bench on the east end from the second to the third floors. From the bottom of the first floor, then up above the second, this one here, so the jury can see it.

A. That is on the second floor, is it not?

Q. Yes, that is the one.

A. Yes, that is on the second floor.

Q. Was that there at that time?

A. Yes, sir.

Q. It was at that time?

A. Yes, sir.

Q. What was it doing there?

A. This was there, I suppose they put it there to come up on the third floor.

Q. You suppose they put it there?

A. Yes.

Q. You had charge of that stope?

A. I had charge of that stope.

Q. And of the ladders and man-ways?

A. Yes, sir.

Q. And that ladder was put there, was it, at the time of the accident?

A. That ladder was not put there by orders from me.

Q. I know, but it was there, was it?

A. Yes, sir.

Q. And had been there for some time prior to the accident, had it?

A. I couldn't say how long.

Q. You don't know how long?

A. No, sir.

Q. A day or two?

A. Probably so.

Q. When had you seen it?

A. I had seen it this night.

Q. Had you ever seen that before?

A. No, I hadn't been over there.

Q. You never went over that way at all?

A. Not very often.

Q. How long since you had been over there?

A. I came over this way and back again two or three times every night.

Q. Over to the face?

A. Yes, sir.

Q. Over to the east breast two or three times every night?

A. Yes, sir.

Q. And you had been doing that right along?

A. Yes, sir.

Q. How wide was this ore chute across the vein or stope?

A. How wide was the stope?

Q. Yes, the ore chute?

A. You mean the lead?

Q. Well, I think that is perfectly plain. How wide was the ore chute across the stope?

A. The rock chute extended across the vein.

Q. From wall to wall?

A. Yes, sir.

Q. And it was the same width on the first floor as on the second and on the third?

A. Yes, sir.

Q. It extended, in other words, from wall to wall.

A. Yes, sir.

Q. And how long was it along the course of the stope, from set to set, wasn't it?

A. Yes, sir; six feet.

Q. Six feet?

A. Yes.

Q. Now then, this slide chute, you say that was made two nights before the accident?

A. Yes, sir.

Q. Were you there at the time?

A. No, sir.

Q. The ore chute made by taking out the timbers between a set?

A. No, sir.

Q. The rock chute?

A. No, sir. They don't take out timbers to make it.

Q. They don't put them in, do they?

A. Yes, they put the chute in.

Q. You said something about there being a couple of feet to walk along beside the chute there.

A. On the top, yes, on the third floor.

Q. On the third floor?

A. Yes, sir.

Q. Where was that—on the hanging or foot wall side?

A. That would be on the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

Q. Which way did that vein dip?

A. It was a fissure vein.

Q. Just tell which way it dipped?

A. It dipped a little to the foot.

Q. How?

A. It slanted to the foot as she went up.

Q. As she went up?

A. Yes.

Q. In other words, it dipped downward?

A. Yes, sir.

Q. In what direction?

A. That would be the hanging—

Q. Oh—

MR. AILSHIE: I object to this, and take exception to the comments and remarks and groans of counsel over the witness' testimony, and I desire my exception noted.

MR. GRAY: I submit there is nothing improper.

THE COURT: Mr. Gray, there is really no rea-

son why you should by movement of the body or arm, or by a groan, or in any other way, comment upon the testimony of the witness. Now, I think perhaps it is a habit rather than intentional. If I thought it was intentional, I should be much more severe, but I must insist that these cases be tried in a fair and straightforward way.

MR. GRAY: I am trying to do that, Your Honor, I simply think the witness don't understand me, that is all.

THE COURT: Yes, but there is no reason why, when a witness answers a question, you should in any way, either directly or indirectly, comment on it.

MR. GRAY: I don't intend. I am trying to treat him just as fairly—

(BY MR. GRAY:)

Q. As you went down into the earth, did it dip southerly or northerly?

A. It dipped southerly.

Q. Dipped southerly?

A. Yes, sir.

Q. Now then, you say that you could pass on the foot wall side of that slide chute?

A. Yes, sir.

Q. And you said there was how much room between that and the wall?

A. Two feet.

Q. How large was this post that was in that set of timbers there?

A. I should judge—about—that would average ten to twelve inches.

Q. Where was this two feet—behind the post, or—

A. Before the posts, between the posts.

Q. Between the posts and the slide chute?

A. Yes, sir.

Q. How wide did you say that slide chute was there on the third floor?

A. Two feet.

Q. Two feet?

A. Two feet, or two feet and a half.

Q. Was it possible to get behind the post, between that and the wall?

A. No, sir.

Q. You said something about the usual way the miners went. Did you give any instructions to the miners as to which way to go up in this fourth floor?

A. No, sir.

Q. Had you gone up with Mr. Johnson any time?

A. No, sir.

Q. Had you gone up with Mr. Holmi any time?

A. No, sir.

Q. Do you know which way they went?

A. No, sir.

Q. Isn't it true that there had been a ladder here from the second to the third floor before that accident?

MR. WAYNE: In which end?

MR. GRAY: Over here in the east end.

A. There was a ladder from the second to the third floor, yes.

(BY MR. GRAY:)

Q. But wasn't there one here from the—from the second to the third?

A. You just asked that.

THE COURT: Answer the question.

A. Yes, sir, from the second to the third.

(BY MR. GRAY:)

Q. It had been there before the accident?

A. Yes, sir.

Q. Well, was that there that night?

A. Yes, sir.

Q. In good condition?

A. No, sir.

Q. What was its condition?

A. It was partly covered up at the top that night.

Q. Partly covered up at the top?

A. Yes, sir, the man-way. There was some rock and drift over the top of it.

Q. Over the top of the man-way?

A. Yes, sir.

Q. The ladder wasn't broken?

A. I couldn't say whether it was or not that night.

Q. The night of the accident?

A. No, sir.

Q. Had you seen it the night before?

A. No, sir. I hadn't been that way the night before.

Q. Hadn't you been up in that stope the night before?

A. I was, sir.

Q. But you weren't over in the east end the night before?

A. Yes, sir.

Q. But not on the second floor?

A. No, sir.

Q. About this timber chute that you spoke of, did you say they took machines up that timber chute?

A. Yes, sir.

Q. Couldn't get them up to the fourth floor that way, could you?

A. No, sir.

Q. Or to take one down that way?

A. No, sir.

Q. Had you given Mr. Holmi any such instructions?

A. No, sir.

Q. How many men did it take to work that windlass down there, or whatever you call it?

A. One man can work it by himself, or two men can work it.

Q. Doesn't it really take two men to work it down at the bottom, and another man up above?

A. No, sir.

Q. It doesn't?

A. The windless, on the second floor—

Q. One man can handle that, can he?

A. Yes, sir.

Q. Could he handle it and lift a machine up?

A. They would have to hook the machine on to the chain, and then go up and windlass it up.

Q. That would be as far as the second floor?

A. That would be as far as the third floor.

Q. That timber chute didn't extend through to the fourth floor?

A. It did afterwards, yes.

Q. Well, I mean at the time of the accident.

A. No, sir.

MR. GRAY: That is all.

RE-DIRECT EXAMINATION.

(BY MR. AILSHIE:)

Q. I will ask you to state to the jury what the first—what is designated as the first floor on both of these maps, to which you have referred, plaintiff's exhibit 1 and defendant's exhibit 1-B, represents?

A. You want me to name the floors?

Q. Yes, to name them.

A. The first floor represents the sill, the sill floor.

Q. Is that true on this map also?

A. Yes, sir. This is the sill; that is the drift, the sill floor.

Q. That is on a level with the drift?

A. Yes, sir.

Q. Now then, proceed. They come in numbers one, two and three?

A. Yes, sir.

Q. Then the one indicated as the second line here, the lower line, on each of them, is—

A. Is the first floor.

Q. The first floor of this stoep?

A. Yes, sir.

Q. Now, will you point to the place where you stated to counsel the ladder was, that the top of it was covered by muck and rock?

A. That was this one here, from the first to the second.

Q. And that is the place that you had in mind when you referred to counsel—in answer to counsel's question?

A. Yes, sir.

Q. And is this the one that you said was partially—may have been broken, or—

A. Yes, was covered on top.

MR. GRAY: I object, if Your Honor please. He didn't say it was broken.

THE COURT: No, he said he didn't know whether it was broken or not, Judge Ailshie.

MR. AILSHIE: I didn't intend to—he said he didn't know, as I remember it.

(BY MR. AILSHIE:)

Q. Now, was there any other ladder that you know of, or do you know, or did you know, of any other ladder on either the second or third floor that was broken or out of order that night?

A. No, sir.

Q. Now, in answer to a question by Mr. Gray, you said that the ore chute filled the entire space from wall to wall, as I understood you?

A. Yes, sir.

Q. I wish you would explain to the jury what you mean by that.

A. We raised the—the chute there, the stope is

a narrow stope. As we raised the chute up, we raised from cap to cap on each end, as we run endways, and that would extend the chute crossways from wall to wall.

Q. I am going to ask rather a leading question here. Was the chute built inside the timbers?

A. Yes, sir.

Q. Then that made the chute about how wide?

A. About five feet.

Q. About five feet?

A. Yes, sir.

Q. What was the condition of the top or opening of the chute on the third floor, where the ore slide entered it?

A. She was open on the hanging wall side.

Q. And what was its condition on the other side?

A. She was covered.

Q. Now, in passing there, which way did you pass?

A. Passed on the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

Q. What, if any, danger was there in passing there that night, or when work was going on there?

A. None at all.

MR. GRAY: That is a conclusion, Your Honor; I think the jury could quite as well draw the inference as the witness.

THE COURT: Well, he has answered. You may cross-examine him.

MR. GRAY: I didn't get his answer.

THE COURT: He said none at all.

(MR. AILSHIE:)

Q. You were asked if you gave any instructions to either the plaintiff or others as to which way they should go up that night?

A. No, sir; I did not.

Q. Was it the custom to give instructions of that kind to experienced miners?

A. No, sir; it wasn't.

MR. GRAY: If Your Honor please, that wasn't exactly what he said.

THE COURT: He was asked whether he had ever given any instructions to his men, as I understand it.

MR. AILSHIE: I took it I had a right to limit it to any one time within that period.

THE COURT: Proceed.

(BY MR. AILSHIE:)

Q. Was the plaintiff what you designate an experienced miner?

A. Sir?

Q. Was the plaintiff here, Mr. Johnson, an experienced miner?

A. Yes, sir.

Q. Do you know who placed the board, or lagging, I believe is what you call it, that board across from the cap to the wall?

A. No, sir.

Q. You don't know who placed that there?

A. No, sir.

Q. Who was the mucker for the plaintiff that night?

A. John Holmi.

Q. What is the duty of a mucker?

A. A mucker is supposed to shovel the rock in the chutes.

Q. And the plaintiff was a—

A. A miner.

Q. Who was the nipper that night?

A. Jackie Lamberton.

Q. Who was running the cage that night in the mine?

A. William Opie was cager.

Q. Was there a man working there named Pelletier?

A. Yes, sir.

Q. What was he working at?

A. He was a kind of a roust-about, all-around man, for carmen or shoveler, whatever was to be done.

Q. Was he working on your shift?

A. Yes, sir.

MR. AILSHIE: Take the witness.

RE-CROSS EXAMINATION.

(BY MR. GRAY:)

Q. Now, Mr. Shaw, isn't it a fact that it is your practice, both in that mine and where you have mined elsewhere, to have at least two man-ways up into a stope?

A. Not always.

Q. Well, wasn't it your practice there, your general practice?

A. No sir, not at that stope.

Q. I didn't ask you about this stope. Just take the mine.

THE COURT: Generally speaking, counsel wants to know if that isn't the general practice?

A. Yes, sir.

(BY MR. GRAY:)

A. And the men are accustomed to go through either one man-way or the other?

A. Yes, sir.

Q. Unless they are instructed to the contrary?

A. Yes, sir.

Q. You had given no instructions not to use this east man-way, had you?

A. This east man-way was only for the convenience of the chute, and not for the miners.

Q. Well, I say you had given no instructions not to use it?

A. No, sir.

Q. About this chute, you said something about this chute being covered on the foot wall side?

A. Yes, sir.

Q. It was open clear over to the wall on the other side, was it, that is, there were no timbers over the top of it on the hanging wall side?

A. It wasn't open clear to the wall on the hanging wall side.

Q. How close?

A. There was a collar brace in there between

the cap and the plank, probably would be twelve inches.

Q. There wasn't a place any wider than eight inches from the wall out over that chute, or along where it was, was there?

A. Yes, sir.

Q. How wide?

A. Two foot and a half.

Q. You say it was covered for two feet and a half there?

A. Yes, sir.

MR. GRAY: That is all.

RE-DIRECT EXAMINATION.

(BY MR. AILSHIE:)

Q. Which side did you say this covering was?

A. On the foot wall side.

Q. On the foot wall side?

A. Yes, sir.

MR. AILSHIE: That is all.

MR. GRAY: That is all.

JOHN LAMBERTON, A WITNESS DULY CALLED AND SWORN ON BEHALF OF DEFENDANT, TESTIFIED AS FOLLOWS:

Direct Examination.

(BY MR. WAYNE:)

Q. Will you state your name?

A. John Lamberton.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your occupation?

A. Well, I am the nipper at the Hunter.

Q. At the Hunter mine?

A. Yes sir.

Q. Were you working there in the month of October, 1914?

A. Yes sir.

Q. And on the night that Mr. Johnson was injured?

A. Yes sir.

Q. I will ask you to state whether or not at any time on that shift, but before Mr. Johnson was injured, you had been on the fourth floor of the four hundred stope west?

A. Yes sir.

Q. What had you been up there for?

A. I went up there to pick up the dull steel.

Q. That is the duty of the nipper?

A. That is my duty, yes sir.

Q. To go up to the different stopes and get the steel and take it down to be sharpened?

A. Yes sir.

Q. Had Mr. Johnson gone to work or was he when you was up there on the fourth floor that night?

A. He was up on the fourth floor. He was barring down the loose ground, I guess, before he started to drill.

Q. Before he started to drill?

A. Yes.

Q. How did you go up to the fourth floor that night?

A. I went up on the east man-way.

Q. And you knew of the existence of the plank there, did you?

A. Yes sir.

Q. Did you go to that way?

A. I did.

Q. Will you state whether or not there was any other way of going up to the fourth floor?

A. Yes sir, on the west end.

Q. The west end?

A. Yes sir.

Q. How would you go up at the west end?

A. Well, I guess this is the west end?

Q. Yes?

A. You go—this is the first man-way, this is the sill floor; this is the first floor; go up to the second floor and up to the third floor.

Q. Just a minute. You go up then in the west man-way?

A. Yes sir.

Q. From the sill floor to the third floor?

A. To the third floor.

Q. And from there where would you go?

A. I go over this way past this chute, and over to this manway on the east end.

Q. And up the man-way at the east end to the fourth floor?

A. Yes sir.

Q. Now, to go up that way you would have to go by the slide chute, and the timber chute, would you not?

A. Yes sir, the timber slide would be here about. It ain't marked on this map?

Q. But it was just west of the slide chute?

A. Yes. I don't know whether it was one or two sets, two sets, I think.

Q. Will you state to the jury whether or not you had any difficulty in going by the slide chute?

A. I didn't go that way, you see, that night that the accident occurred.

Q. At other times?

A. No; I passed that way before all right.

Q. MR. GRAY: I don't think some other time would be a proper test.

A. The night—

MR. GRAY: Unless it were after the accident.

A. The night before, even; but this night I went up on the east end, that the accident occurred.

(By MR. WAYNE.)

Q. How did you come down that night?

A. I come down the same way.

Q. The night before, when you went by the slide chute, how much space was there to go by it?

A. Oh, I should say about two feet.

Q. On what side?

A. On the foot wall side.

Q. On the foot wall side?

A. Yes sir.

Q. Did you notice that slide chute, as to the manner in which it was constructed, how it was constructed, how it was built, what shape it was?

A. It was built from the fourth floor to the third floor.

Q. As to the size of it both at the top and at the bottom?

A. Well, I couldn't tell exactly the size of the chute.

Q. In going by this chute on the foot wall side, what were you walking on?

A. Walking on plank, and naturally a little dirt, that drops over the slide chute, you know, drops on the floor.

Q. Where were you at the time that Mr. Johnson was injured?

A. I was on the 800 level.

Q. And how soon after his injury did you see him?

A. Well, I couldn't tell exactly. It was about seven o'clock I guess, when I see him.

Q. And where?

A. On the 400 level.

Q. How had you gotten to the 400 level?

A. I flashed to the cage on the 800 level; I want to go on top. And during the time I was coming from the 800 to the 400 I guess Mr. Johnson flashed for the cage, and the engineer stopped, and Mr. Johnson got on.

Q. I will ask you to state if after Mr. Johnson was injured you went to the place where he was injured?

A. How soon after you saw him?

A. Yes.

A. Maybe two hours after.

Q. I will ask you to state if you examined that plank or that lagging at that time?

A. No sir.

Q. You didn't?

A. Just walked up over it, the same as I did before.

Q. What was its condition as to being in place or otherwise?

A. It was the same as I had seen it the first time I went up.

Q. How did you come down out of the fourth floor?

A. Down the same way.

Q. Mr. Lamberton, do you know the size, or the weight, rather, of these Ingersoll hammer drills?

A. I should judge about 75 pounds.

Q. What would you say as to whether or not a man could pass that slide chute while carrying one of these drills?

A. Well, yes, he could.

Q. Was there any other way provided for talking drills from the level to the floors above, other than carrying them up?

A. Yes sir.

Q. What means?

A. A conveyance for that purpose.

Q. What conveyance?

A. A timber slide.

Q. How would you get them up in the timber slide?

A. Well, they had a winch there, you know, what they call a hand winch, on the second floor.

Q. Just exactly how did you fasten the machine on and take it up?

A. Well, you tie it on to the end of the chain, and the two men, if one couldn't do it, could go to the second floor, and the third floor, and one man could go up and hold it, while the other would take it off, but one could hoist up one of those hammer drills very easily.

Q. This winch you speak of was nothing but a windlass?

A. Just an ordinary windlass.

Q. Wound up with a rope on the end of it?

A. Yes sir.

MR. WAYNE: Take the witness.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. That was really put in to hoist timbers up for timbering the mine?

A. Yes sir.

Q. That was why they called it a timber chute?

A. Yes sir.

Q. Was this plank you walk over that night nailed to that post?

A. I couldn't tell.

Q. You don't know?

A. I don't know.

Q. Do you say, Mr. Lamberton, that you went by that slide chute the night before?

A. Yes, sir.

Q. Isn't it true that you came up to it the night before and called out, and after Holmi called down to you you went back around the other way?

A. Not the night before, sir.

Q. Did you on this particular night?

A. I did one night, I remember, but I could get by there, but I didn't want to stop the men from throwing the rock down the chute, you see.

Q. That is the reason you went the other way, is it?

A. Yes, that is the way I went back, you see.

Q. Did the men stop shoveling while he talked to you?

A. I shouted out to him—yes, he stopped, certainly he did.

Q. The rock wasn't rolling down there then, was it?

A. No, not down the chute, no.

Q. Why didn't you go through then?

A. Because I preferred to go down the other way, I guess. He just opened that chute then, you know, and it didn't look very nice to go through there then. It makes lots of difference, you see.

Q. It gets safer, does it?

A. Oh, I don't know.

Q. Then you went back and went down those ladders, and came around and came up this way?

A. No sir.

Q. How did you go?

A. I don't think I went up there that night, if I remember, I think Johnson told me there wasn't any steel up there that night. Didn't you, Johnson?

THE COURT: No.

MR. GRAY: That is all.

MR. WAYNE: That is all.

MR. GRAY: I want to ask Mr. Shaw one other question.

MR. SHAW recalled.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. Was the plank nailed to the cap?

A. I don't know, sir.

Q. Didn't you examine it there?

A. I looked at the plank, yes sir.

Q. And you can't tell whether it was or not?

A. No sir.

MR. GRAY: That is all.

JOE PELLECIER, A WITNESS DULY CALLED AND SWORN ON BEHALF OF PLAINTIFF, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Will you state your name?

A. Joe Pellecier.

Q. Where do you live?

A. I don't know what you mean.

MR. WAYNE: It appears that we will have to use an interpreter with this man.

THE COURT: Is he French?

MR. WAYNE: He is an Italian, but he speaks French. I have a man here who is also a witness that can speak French.

MR. GRAY: We object to it. Mr. Hanson says this man talks pretty good English.

MR. WAYNE: I object to the statement of counsel, and assign it is prejudicial, if Your Honor please. It is a question for the court to pass upon.

MR. HANSON: Counsel had a long talk with him upon the wharf at Harrison, in my sight; I saw him.

MR. WAYNE: I object to that statement of counsel, and assign that as prejudicial.

THE COURT: Yes: The jury will not be influenced by this. I don't know how a conversation in your sight would help very much. If it was in your hearing it might be different, Mr. Hanson. I think we will try to find out what the fact is. I trust the jury will not be influenced by these statements. What we are trying to get at is the truth, and get along as fast as possible.

THE COURT:

Q. Mr. Pellecier, are you a Frenchman or Italian?

A. An Italian.

Q. You speak French?

A. Yes.

Q. How long had you been in this country?

A. Four years and a half.

Q. Are you a married man?

A. No sir.

Q. You have been in the United States four years and a half without going back to the old country?

A. Yes sir.

Q. Now, if the questions are put to you in a sim-

ple way, you could understand them pretty well, couldn't you?

A. Not very much.

THE COURT: I think you will understand pretty well. I will ask the counsel to make the questions single and simple, and then you speak out pretty loud. It will take a long time for us if we have an interpreter, and I would like to have you do the best you can.

(By MR. WAYNE.)

Q. Mr. Pellecier, where do you live?

A. Mullan.

Q. You are working at the Old Gold Hunter Mining Company there?

A. Yes.

Q. You know Mr. Johnson, do you?

A. Yes sir.

Q. You were working on the same shift with him when he was hurt?

A. Yes sir.

Q. What were you doing?

A. I was carman there.

Q. What does a carman do? What were your duties? What did you do?

A. Take the muck off of the ore chute.

THE COURT: If you understand him, Mr. Wayne, you may repeat his answer.

(By MR. WAYNE.)

Q. You also did mucking, did you?

A. Some, yes.

Q. Had you ever mucked up on the fourth floor to this chute where Johnson was hurt?

A. Yes sir, a little bit.

Q. And how long before he was hurt had you been mucking up there.

A. The night before.

Q. The night before?

A. Yes sir.

Q. How did you go up and come down to and from the fourth floor?

A. I went up here, on the west end, and then go by here, on the fourth floor, go by that way there.

Q. You went up the man-way at the west end?

A. At the west end.

Q. How far up?

A. Three floor high.

Q. And then when you got to the third floor where did you go?

A. Go over on the east end.

Q. Up to the ladder way at the east end?

A. Yes sir.

Q. And then up that ladder to the fourth floor?

A. Yes sir.

Q. Now, to do that you had to pass by a slide chute?

A. The slide chute, yes sir.

Q. Do you know who built that slide chute?

A. I built it.

Q. You built it?

A. Yes sir.

Q. Anybody help you?

A. Mr. John Holmi.

Q. When did you and Holmi build it, when, what night?

A. About a couple of nights before he got hurt?

Q. And you say a couple of nights before he got hurt?

A. Yes sir.

Q. How was that slide chute built, just describe it?

A. How wide?

Q. Yes, how wide was it?

A. About two feet and a half, something like that.

Q. Where,—on the top or the bottom?

A. The bottom.

Q. How wide was it at the top?

A. It was a little wider, about a foot or more wider.

Q. About a foot or more wider at the top?

A. Yes sir.

Q. Do you know why it was made narrower at the bottom?

A. I don't.

Q. Do you know why it was not so wide at the bottom?

A. I don't understand.

THE COURT: Why was it wider at the top?

A. Because, you see, the hole on the top was a little lower on the foot wall, and the hole below was a little over on the other side, you see, had to make it a little wider on top.

Q. Now, in passing this slide chute, which side of it did you go by on?

A. On the foot wall.

Q. And how much space did you have?

A. About two foot, something like that.

Q. Two feet?

A. Yes.

Q. And what were you walking on as you went by the slide chute?

A. On the foot wall.

Q. What were you walking on dirt or —

A. You have a little dirt that come off on the slide as you go down, jump off from the slide.

Q. Were there lagging in there?

A. Yes, lagging below, in the bottom.

Q. And the dirt on top?

A. Yes sir.

Q. Now, you have seen Ingersoll Hammer Drills, haven't you?

A. How?

Q. You have seen these Ingersoll Hammer Drills, the machine drills that they used up there?

A. Yes sir.

Q. What would you say as to whether a man carrying one of those drills could pass that slide chute on the third floor, on the foot wall side?

MR. GRAY: On the night of the accident?

MR. WAYNE: Yes.

A. Yes, he can go by all right.

(By MR. WAYNE.)

Q. Mr. Pellecier, were you on the fourth floor at any time on the night that Johnson got hurt?

A. I been up when he go in, in the mine, before they started to run the car.

Q. Had you gone clear up to the fourth floor that night?

A. That night I don't remember what way I went up, I couldn't tell now.

Q. Did you go clear up to the fourth floor?

A. Yes, I went up on the fourth floor.

Q. You don't know which way you went that night?

A. No, I don't remember which way I went up.

Q. Did you go through a place over at the east end of that stoop on a piece of lagging?

A. Yes.

Q. Who had told you of it?

A. Nobody that I remember.

Q. Well, were you ever told by John Holmi that there was a plank there?

A. No sir.

MR. GRAY: I object to that, if Your Honor please. Your Honor sustained an objection to my question to Johnson about that.

MR. WAYNE: Well, there was a different reason for that. It isn't at all important, if Your Honor please, how Holmi found out about this, we have a right to impeach him, while plaintiff's counsel has not.

MR. GRAY: That isn't impeaching him.

MR. WAYNE: Holmi said the first he knew of the plank was when either Johnson or Pellecier had told him. I simply want to show that it was not Pellecier that told him.

MR. GRAY: I wanted to show that it was not Johnson. I think it is rather immaterial either way.

THE COURT: It doesn't seem to be very material, I did not understand that the answer—that is that the answer to which you now direct his attention was in just that form. I think, if that be your purpose, I shall permit you to ask the question, and permit the plaintiff, if he desires, to testify in rebuttal. I don't quite see the importance of it even now, but if you go into it at all, of course, I shall let the plaintiff testify upon the same subject.

MR. GRAY: I object to it as immaterial. I don't think it is material. I couldn't see at the time—

THE COURT: Well, the matter has been opened up, and I shall let you go into it that way. I am not quite clear as to just how it is material, but I presume you both thought it was material at one time. You may ask the question. And then Mr. Gray, you may recall the plaintiff later on.

MR. WAYNE: I will reask the question.

(By MR. WAYNE.)

Q. Did you tell John Holmi about there being a plank there?

A. No sir.

Q. Why did you use to go up this plank?

A. MR. GRAY: That, if your Honor please, as to why he did it, would be calling for something that would be immaterial.

THE COURT: What is your purpose, Mr. Wayne?

MR. WAYNE: Merely to show that it was a matter of convenience rather than necessity.

THE COURT: The objection is overruled.

(By Mr. Wayne.)

Q. Why did you use this plank at all?

A. I don't understand.

MR. WAYNE: That is all.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. Were you down at that slide chute that night, the night he was hurt, were you down here at the slide chute the night that Johnson was hurt?

A. Yes sir, the chute was broken when I went up in the stope, and me and Mr. Holmi fixed him up again.

Q. That was after the accident?

A. No, before they started work, the same day.

Q. John Holmi was a carpenter, wasn't he?

A. Yes sir.

Q. That was the slide chute?

A. The slide chute.

Q. How about the lagging, the boards up in front of the slide chute, any of those broken?

A. In front of the slide chute, they have a hole to go down the chute.

Q. How wide was that hole?

A. Oh, a couple of feet, something like that.

Q. Wasn't it more than two feet?

A. Something like that. I can't tell for sure how much he was.

Q. You are still working up there?

A. Yes.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Pellecier, did you say that you were over to the slide chute on the third floor the night that Johnson was hurt?

A. Walk over there?

Q. Were you up there at all that night?

A. Yes sir.

Q. Over at the slide chute?

A. I had been up there before I started to work, the same day.

Q. And you could get by there then?

A. Yes sir. I fixed the slide there then.

Q. You fixed the slide?

A. Yes, me and John Holmi.

Q. In fixing the slide, did you go in and around it?

A. I been on top on the fourth floor before I go down and run the car.

MR. WAYNE: That is all.

MR. GRAY: That is all.

GEORGE ASHLAND, A WITNESS DULY CALLED AND SWORN, ON BEHALF OF THE DEFENDANT, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. State your name?

A. George Ashland.

Q. Where do you live?

A. Mullan, Idaho.

Q. How long have you lived there?

A. I have been there since 1901.

Q. Where do you work?

A. At the present time at the Hunter.

Q. How long have you worked at the Hunter?

A. Between eighteen, seventeen and eighteen months.

Q. What is the kind of work you do?

A. Miner.

Q. What kind of a miner?

A. Machine man.

Q. Do you know Mr. Johnson, the plaintiff?

A. Yes sir.

Q. I will ask you to state where you worked in the Hunter mine on the 17th of October, which was the night he was hurt?

A. I was on 600 first, when I started to work.

Q. Did you work on any other level that night?

A. Yes sir.

Q. What level?

A. 400 level.

Q. And what floor on the 400 level?

A. Fourth floor.

Q. In which stope?

A. In that 400 stope.

Q. The stope where he was injured?

A. Yes sir.

Q. How did you happen to go up there?

A. Mr. Shaw come after me and told me to go up there, the man was hurt.

Q. You went up then and took Johnson's place?

A. Took his place.

Q. Will you tell the jury where you got the drill?

A. I got the machine on the first floor, at the east end, and I took the machine up that way. I seen there was another ladder there, and I went up, and after that I didn't find no more ladders.

Q. Just a minute. How did you take the machine up? Which way did you go?

A. Here, I went up that way, and here there was no ladder, over here.

Q. You went up to the third floor on the—to the second floor, on the ladder, is that right?

A. Yes, right there, there was no more, from the sill up to the —

Q. To the second floor, you went by way of the ladder in the east man-way?

A. Yes sir.

Q. Then you say you found no ladder on the second floor, from the second to the third floor?

A. No sir.

Q. Where did you go then?

A. I walked over there, and there was a bench there, and I climbed up on that bench, and up on that plank through there, went up on the fourth floor.

Q. You went east on the second floor to the bench of rock, up the bench—

A. Yes.

Q. Up the lagging?

A. Yes.

Q. To the third floor?

A. Yes.

Q. And then up the ladder to the fourth floor?

A. Yes sir.

Q. Who was up there when you got there?

A. John Holmi.

Q. What was the condition of this plank or lagging when you went over it?

A. It lay flat on top of the cap, and down to the bench against the face.

Q. How much lower was the lower end of the lagging than the upper?

A. Oh, about a couple of feet, I guess, that is about all.

Q. And what size lagging was it?

A. I think it was a foot wide, if I remember right, it was a foot wide.

Q. And how thick?

A. Two inches.

Q. How long?

A. About six feet.

Q. Now then, did you have occasion to go to the sill floor any other time that night?

A. No, I didn't go any more that way.

Q. Did you go to the sill floor at all?

A. Oh, yes, I did.

Q. How did you get down?

A. After I find out—I tried the machine, the machine was leaking, and then I loosened the side around, and I picked it and find out she working fine, and then I look for steel, and then I come back this way—I come down this ladder.

Q. In the east end?

A. Yes sir, then I come this way.

Q. To the third floor?

A. Yes sir, and I find the timber slide was covered with planks, to protect the people from falling in these, and then I took a plank up, you know, I took them out so I got my steel down in, and I come down here right along side that slide chute, and down to this man-way.

Q. You came past the slide chute to the west man-way, and down that to the sill floor?

A. Yes sir.

Q. I will ask you to state to the jury whether or not you had any trouble getting by this slide chute?

A. No, didn't have no trouble to go by.

Q. How much space was there between the slide chute and the wall of the stope?

A. It was over two feet, I know, over two feet.

Q. Do you know the size of these hammer drills that were used there?

A. Yes sir.

Q. State to the jury whether or not there was room for a man carrying a hammer drill to go by that chute?

A. Any place where a man goes you can pass three or four of those machines, because they are not more than six or seven inches, the biggest the machine, and about four feet long.

Q. Which side of the slide chute did you pass on?

A. I find the slide chute there; it has got two planks on the bottom, one on each side, and the planks was about twelve inches, and it was two inches thick. It would make about 28 inches wide.

Q. Which side did you pass on?

A. On the foot wall side.

Q. And as you walked by the slide chute, what were you walking on?

A. I was walking on the plank there, and some timbers they put over the ore chute, round timber, called the grizzly, over the chute. That is the name they call it, that is to make the hole small.

Q. Now, how many shifts did you work there afterwards?

A. That is the only night I worked there. I worked before that, about two weeks before that.

Q. What would you say as to the condition of the third floor as you passed the slide chute, so far as any loose muck, dirt, or rock was concerned.

A. There was very little on the floor, you know, about a foot thick, something like that.

MR. GRAY: One foot thick?

A. Yes, about a foot thick on the floor, of rock.
(By MR. WAYNE.)

Q. Did you notice the shape and the manner in which this slide chute was built?

A. Yes sir.

Q. How was it built?

A. It was built on the top of the fourth floor, on the top of the cap. It is not built between the posts at all on the top—on the top of the cap, like this. It goes down and gives you plenty of room underneath to come underneath this chute here, and the other end is down on the ore chute, on the top of the ore chute.

Q. On the top of the straight ore chute?

A. Yes.

Q. Will you state about what the width of that slide chute was at the top and at the bottom?

A. Well, it looks to me like it was the same.

Q. It looked to you as though it was the same?

A. Yes. It had two twelve inch planks in the bottom, and it looked to me like it was that way all the way through, nine feet long.

Q. How did you take your steel up after you got it on the sill floor?

A. I wind it up there with that hand machine.

Q. With that windlass?

A. Yes.

Q. How long have you mined?

A. Since 1901.

Q. Always in the Coeur d'Alene?

A. Well, I have been out once in a while and back again.

MR. WAYNE: That is all.

CROSS EXAMINATION.

(By MR. GRAY.)

Q. You say that slide chute was the same width at the bottom as it was at the top?

A. Yes sir, it looks to me that night that way. I didn't make no remarks at all of it.

Q. When did you say you went to work for the Hunter? How long have you worked for the Hunter?

A. About between seventeen and eighteen months.

Q. Continuously, right straight along?

A. No sir.

Q. When did you go to work for them the last time?

A. On the 17th of this last month.

Q. On the 17th of May?

A. Yes.

Q. How long had you been out of their employ?

A. I have been there about eighteen months, I say.

Q. I say, how long had you been out of their employ before you went to work on the 17th of May?

A. I was out, about two weeks, and went back again.

Q. How did you happen to quit two weeks before?

A. I got fired.

Q. And they took you back on the 17th of May?

A. Yes sir.

Q. When you went away from your work that night, which way did you go down?

A. I went down to this west man-way.

Q. Isn't it true that you followed right down with Holmi, down this east way, the same way you had come up first?

A. I just went—

Q. Just answer the question. Didn't you do that, go down the plank?

A. No sir.

Q. When you quit work?

A. No sir, I did not.

Q. Did you have a conversation with Mr. John-

son about a little over ten days ago in Mullan, at the Windsor Hotel corner, at which you and he were present, before you went back to work for the Hunter?

A. Yes sir.

Q. In which you told him in substance that when you went to work that night you had to go up this same plank, the east man-way, and that you couldn't get by the slide chute?

A. No sir, no sir.

Q. You didn't have any such conversation?

A. No sir. A very short word was all.

Q. Where was it that this muck was a foot deep that you spoke of?

A. Down on the third floor.

Q. Around the ore chute?

A. Between the slide and the wall.

MR. GRAY: All right. That is all.

RE-DIRECT EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Ashland, you did, however, go up and take your drill up over this plank when you first went to work?

A. Yes sir.

Q. Will you state whether or not you ever passed over that plank again.

A. I never come back any more, I never pass over that, because I thought there was a man-way there, and I find out there was no more ladders then, only two.

Q. How far did you have to walk on the third

floor from the foot of that east ladder to the ladder in the west man-way?

A. From this here, you mean?

Q. Yes, from that?

A. How far did I have to walk to climb up this ladder?

Q. No. How far is it from this east ladder to the west ladder?

A. Oh, about forty-five feet, around there.

MR. WAYNE: That is all.

MR. GRAY: That is all.

MR. WAYNE: The defendant rests.

EDWARD JOHNSON, a witness on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Johnson, had you told Holmi about going by way of the plank?

A. No.

MR. WAYNE: I object to that, if Your Honor please, as an effort to impeach his own witness.

THE COURT: Overruled.

(By MR. GRAY.)

Q. Just tell the jury whether Mr. Shaw, the shift boss, was up in the stope the night of the accident, before you were injured.

A. No, he wasn't up that night there. The night before he was up there, but not that night.

Q. Mr. Johnson, was there a grizzly here at the bottom of that slide chute.

A. No.

MR. AILSHIE: I object to that as leading and suggestive.

THE COURT: Overruled.

(By MR. GRAY.)

Q. Did you have a conversation with Mr. Ashland some time ago, a little over ten days ago, at the corner of the Windsor Hotel, at Mullen, at which you and he were present, and in which he told you that the night after the accident he had to go around by the east man-way and up this plank, and that he couldn't get by the slide chute?

A. Yes, I had. He said he couldn't get by that slide chute, that he took the machine the same way, and went the same way I did, and he pretty near fell there too, pretty close to fall.

MR. GRAY: That is all.

MR. WAYNE: That is all.

JOHN HOLMI, a witness on behalf of plaintiff, upon being recalled testified as follows:

DIRECT EXAMINATION.

(By MR. GRAY.)

Q. Mr. Holmi, the night of the accident, before Mr. Johnson was hurt, did you see Mr. Shaw, the shift boss, up in that stope, up where you were working?

A. Before?

Q. Before he was hurt?

A. No.

Q. Do you know what a grizzly is? Do you know what a grizzly is?

A. No, I don't.

Q. Well, at the bottom of this slide chute and over any part of the ore chute—

A. Oh, I know now.

Q. A little round—was there any grizzly over that ore chute there?

A. No.

Q. The night of the accident?

A. No.

Q. You know what a grizzly is now, do you?

A. Yes, I know.

MR. GRAY: You may inquire.

CROSS EXAMINATION.

(By MR. WAYNE.)

Q. Mr. Holmi, it was the custom of the shift boss to work the two chutes downward each night, was it not, to go to each chute?

A. Each stope?

Q. Yes, each stope?

A. I think so.

Q. Well, do you know that Mr. Shaw was not in this stope the night that Johnson was hurt, before he was hurt?

A. Yes, because I remember that Johnson told me about—

Q. Johnson what?

A. Johnson told me about the machine.

Q. Never mind about Johnson.

MR. WAYNE: I object if Your Honor please, to what Johnson told him.

(By MR. WAYNE.)

Q. You say you didn't see Shaw there?

A. Not before Johnson got hurt.

Q. He might have been there and you have not seen him, might he not?

A. Yes, if he was on the first floor, I didn't see.

Q. How about if he was on the third floor?

MR. GRAY: I don't think that is material, Your Honor.

A. He could be in this west end, this west end of the stope, right here.

(By MR. WAYNE.)

Q. He could be in the west end of the stope on the third floor and you not see him?

A. Yes.

Q. Is that what you mean?

A. If he put his light off and come pretty easy, pretty slow, I think may be.

Q. He could have been in the east or central portion of the third floor and you not see him from the fourth floor, couldn't he?

A. No, not on the third floor.

Q. Why not?

A. Couldn't get in dark on the lagging on the east end, fall down, and we saw the light when he was coming here, if he come here.

Q. If he came up the west man-way he could be any place on the third floor and you couldn't see him from the fourth, couldn't he?

A. He couldn't come by this—I was mucking on top.

MR. WAYNE: If you will just repeat the question. I think I will insist upon an answer to that question.

(Last question read.)

(By MR. WAYNE.)

Q. The fourth floor there was lagging in between these different sets, was there not?

A. Yes.

Q. And there was a pile of muck on top of the lagging, was there not?

A. Yes.

Q. Could you see his light through the pile of muck and the lagging?

A. I saw light in the man-way when I was working here.

MR. WAYNE: That is all.

MR. GRAY: That is all, Mr. Holmi. We rest.

MR. AILSHIE: That is all.

THE COURT: Gentlemen of the jury, you may be excused for a few minutes. Remain in the hallway, however. Perhaps you had just better go into the jury room and sit there for a little bit.

(Jury retires from the court room.)

MR. AILSHIE: Now at this time, the defendant moves the court to instruct the jury to return a verdict in favor of the defendant, upon the grounds that the plaintiff has failed to make a case sufficient to go to the jury or to support a verdict in favor of the plaintiff, and that they have particularly failed for the following reasons:

1. That it appears by the evidence of the plaintiff himself, as well as by the evidence upon the whole, that the injury inflicted was such as resulted from an assumed risk.

2. That it is shown that the plaintiff was guilty of gross negligence.

3. That it does not appear anywhere in the evidence that the defendant has been guilty of any act of negligence.

4. That if the place where the plaintiff was injured was in any way dangerous, or any more unsafe than any other way he could have gone or passed over, that it was placed there, and the result of the act of a fellow servant.

That it further appears that his injury resulted from the negligence of the plaintiff in choosing between ways of going or two modes or courses of conduct, and that they were not influenced by the defendant.

(Argument by counsel and remarks by Court.)

THE COURT: I think that perhaps while the case is without any precise precedent, I shall have to take the view that it is one for the jury. Therefore the motion will be denied.

MR. WAYNE: Does the order of the court cover this motion and give us an exception to it, or should we prepare that in writing?

THE COURT: You have your exception. The motion is sufficient, and you may have your exception.

(Jury returns into court room.)

THE COURT: If you have any requests, I would like to have them before the argument opens, gentlemen.

Adjourned until 7:30.

THE COURT: Gentlemen, as you have been advised the plaintiff has brought this action upon the theory that while he was in the employ of the defendant he was injured through the defendant's negligence in not providing him a safe place in which to work. It is conceded that he was so employed, and that while in the performance of his duties he fell and was injured, and has suffered some damage. The question for you to decide are as to whether or not the defendant company was at fault, and whether or not the plaintiff himself was free from fault, and if you answer both of these questions in the affirmative, what is a reasonable amount to award to the plaintiff for his injuries.

The case has been calmly tried, and argued to you in a commendably way. While counsel differ as to the conclusions, they have discussed the facts, and doubtless are able to assist you to some extent in getting at the truth. Some of you were upon the jury that tried the last case, and you heard the instructions that were given then. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case.

As I assume all of you understand, at least I so inferred from your answers when you were being qualified as jurors, it is not in every case where a man is

injured that he is entitled to recover damages from his employer. It is only in cases where the employer has violated some duty he owes to his employee that he becomes responsible for an accident which may occur. The violation of that duty is what we ordinarily call negligence, and what counsel have referred to as negligence in the trial of this case. And the facts question for you to consider is whether or not the defendant was negligent, for if you answer that question in the negative that is the end of the case. The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident. Now, counsel have not differed as to what is meant by the term negligence. It is generally understood to be the doing of something which a prudent person would not under the circumstances do, or the leaving undone of something which a person of like prudence would have done under the circumstances. You will see that there is no hard and fast or definite rule or measure; it is a principle and a general rule, and when it comes to the application of the rule to the facts in the case we must leave that to the good sense and experience of men such as you are, who have had some knowledge of the practical affairs of like, and have some ideas of how men ordinarily and usually act, that is, men of prudence, and men who have a proper or due regard for the rights and safety of others. So that the first question here is, did the defendant act with reasonable prudence in providing a way by which the plaintiff could go to and come from his place of work

in its mine. And, as I have already indicated to you, it must appear that its failure to provide such a way or to use due care in providing such a way, if it was negligent in that respect, contributed to the injury. Upon this issue, that is, the question whether or not the defendant was negligent, the burden of proof is upon the plaintiff. He, the plaintiff, must show you, that is, convince you, by a preponderance of the evidence, that the defendant was negligent substantially in the manner pointed out in his pleading, the amended complaint. Now, if you find in his favor upon that issue, there are still some other questions upon which you must pass before you could find in his favor upon the suit as a whole. It is a general rule, and I should say to you that it is a rule adopted by the express statute of this state, and hence is binding upon all of us, if we are law abiding citizens, it is a general rule that even though the defendant is negligent, and that negligence contributes to an injury, if, at the same time, the plaintiff himself, the employe, is guilty of negligence also contributing to the injury, then he, the plaintiff, the employe, cannot recover from his employer. That is what is ordinarily referred to as contributory negligence. In some quarters it is thought to be a harsh doctrine. But, as I have said to you, whatever may be your preconceived ideas upon that point, it is a rule of law in this state, and, as law abiding men, we should enforce it until, through the legislative department of the government, a different rule is established. Now, contributory negligence is just like other negligence,

that is, it is the doing of something which an ordinarily prudent employe would not do. It is taking a chance that an ordinarily prudent employe would not take, or it is the leaving of something undone by him which an ordinarily prudent employe would do. You will see that negligence is the same whether it be of the employer or of the employe. One is called the primary negligence, that of the employer, and the other contributory negligence, that of the employe. Now, as to this issue, the burden of proof is not upon the plaintiff, but is upon the defendant; that is to say, before you can find that the plaintiff is debarred from recovering by reason of his own negligence, it must appear by a preponderance of the evidence that he was so negligent. However, if it appears to your satisfaction from the evidence as a whole, then it is unimportant from what source the proof of evidence may have come, and as I have already intimated to you, if you find that the plaintiff himself was guilty of negligence in the premises, and that his negligence contributed to his injury, then he cannot recover.

And still a third issue, and as to this I invite your particular attention, because it has entered into one phase of the argument of the case to a very large extent. Even though you should find that the defendant was negligent, even though you should find that the plaintiff was not negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employe. I will explain that to you in this way. If one, being

in the employ of another, uses a tool or a piece of machinery which is defective, or works in a place which is dangerous, and he, the employe, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use of a very familiar and simple device, and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand, and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employe knows nothing about it, and uses the device ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employe, he calls his attention to it, and the employe is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he suffers injury, because he impliedly agrees to take the chance. You will see that the rule is in accord with reason. Now, if in this case, under that principle, the plaintiff knew of the dangerous condition complained of, and went ahead and worked therein, and used a danger-

ous passageway, he could not under the general principle, recover, that is, he would be debarred, he would under the law be taking the chance. There is one exception to that rule of assumed risk, and it is the one referred to during the course of the argument, and, that I may state that exception a little more precisely, I read to you what I have jotted down here as a definition of the exception. For a certain time the employer may remain liable for failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the workman's appreciation of the danger, if it, the employer, induces the workman to keep on, by a promise that the course of the trouble will be removed. To be more specific, and to apply the principle thus stated in general language to the issues in this case, suppose that you are convinced, first, that at the time of the accident and for a few days prior thereto the defendant had provided no reasonably safe way for the plaintiff and others to use in going to and coming from their place of work, I say, suppose that you find such to be the situation, and, second, suppose that the plaintiff was aware of this condition, and, by reason of his age, intelligence and experience as a miner, he was able to appreciate the perils, then the general principle or rule is that by continuing to use the dangerous way, or one of the dangerous ways so appreciated, he assumed the risk of injury; that is, by continuing in the employment, he, in effect, said to the defendant that he would not hold it responsible for any accident which might occur from such use. But—and here is the ex-

ception heretofore stated in general language,—if, under such circumstances, the plaintiff, that is, Mr. Johnson, called the dangerous condition to the attention of the defendant's representative, its shift boss, and the defendant, through the shift boss, there-upon promised to remedy the defect or to provide a safe way, and, in reliance upon such promise, the plaintiff continued to work, and therefore necessarily used a way of getting to his work or coming from it which involved a measure of peril for a time, not of unreasonable duration, and consequently suffered injury on account of such unsafe way, then he is not necessarily debarred from recovering by the general rule of assumption of risk; that is, if there was a promise to provide a safe way, it is for you to say whether under all the circumstances and in view of such promise the plaintiff was wanting in reasonable care in continuing in the employment of the defendant, and, in the course thereof, using the way which he did use in getting to and from his work, if not, the plaintiff is not debarred from recovering, and the defendant is not relieved from the result of its failure to provide a reasonably safe way, by the contributory negligence of the plaintiff. I say, if you find that under all of those circumstances, and in view of the promise, if you find a promise was made, the plaintiff was not negligent in continuing to work, and in choosing the way that he did choose, then he would not be debarred by his contributory negligence.

In this connection it is proper that I direct your attention to the fact that there is evidence tending to

show that there was another way of reaching the place and coming from the place where the plaintiff was at work. There is a conflict of evidence upon that point, but there is evidence tending to show that there was such a way, and evidence to rebut it. The defendant contends that this other way was a safe one, that is, the way going by the rock chute or slide. If you find that it was a reasonably safe way, and that plaintiff knew of its existence, and, instead, of using it, for his own convenience he carelessly used the more dangerous way, then he could not recover, for, as you will see, his injuries would upon that assumption be the result of his own carelessness in taking a dangerous way, when one reasonably safe was open for his use.

If you find that the defendant was negligent, and knew the negligence contributed to the plaintiff's injury, and that he was not guilty of contributory negligence, and that he did not assume the risk, as I have explained that to you, together with the exception to the general rule, then you should find in his favor. Your attention has been called to the fact that it is admitted that he was injured, and that his injuries are of a more or less serious and permanent character. The amount of the damages, if you find for the plaintiff, is left to your sense of fairness, discretion and good, common sense. There is no definite measure, there is no fixed standard by which these damages can be measured. You will take into consideration the nature of the injury, and the degree of permanency, the pain and humiliation already

suffered, and which will be suffered, the loss of time, and the measure of disability in the future, that is, the disability to work, and all other facts and circumstances in evidence, and reach a conclusion such as you think will be a fair compensation to him for his loss.

Gentlemen, there is some conflict of testimony and it is for you to reconcile those conflicts so far as may be. I am leaving to you entirely the issues of fact. I am leaving to you entirely the credibility of the witnesses, and the weight to be given to the testimony of any of them. It is for you to say upon which side the truth lies, and it is for you to determine the issues of fact. I cannot relieve you from that responsibility, and I have no disposition to try to influence you one way or the other in finding upon these facts. And, as I am leaving to you fully the determination of the issues of fact, I assume that you will in good faith undertake to apply to the facts fairly the instructions which I have given you, in their spirit and effect.

It is necessary that all of you concur in finding a verdict. It takes all twelve of you in this court. Two forms of verdict have been prepared, one for your use in case you find for the plaintiff, and one for your use in case you find for the defendant. You will have no difficulty in making use of them, and in filling in the blank, if you find in favor of the plaintiff, and your foreman will sign the verdict which expresses your conclusion.

MR. AILSHIE: At this time, in the presence of the jury, and before they retire, defendant excepts to the refusal of the Court to give its requested instructions No. 1, No. 2 and No. 3.

At this time the defendant excepts to that part of the Court's instructions in which the Court referred to the instructions in which he defined the assumption of risk, and the illustration given there of the use of an axe and pitchfork, on the ground that it does not properly define the law of assumption of risk, and is prejudicial to the defendant.

MR. WAYNE: One other exception, if Your Honor please, to the instruction of the Court advising the jury that they must first find whether the defendant was negligent, and, if so, whether the negligence of the defendant was the proximate cause of the injury, or contributed to the injury, our exception being to that portion of the instruction to the effect that they might find for the plaintiff if the negligence of the defendant contributed with his own negligence to his injury.

THE COURT: I didn't intend so to instruct. I thought that when I came to contributory negligence that I expressly instructed them that even though the defendant was negligent, and that negligence contributed to the injury, still, if he was negligent, and his negligence contributed to the injury, he could not recover. Did I not so instruct?

MR. GRAY: Yes.

MR. WAYNE: I think the instruction I refer

to was on the question of the negligence of the defendant itself. It was in the early part.

THE COURT: I think perhaps I have made that clear. I think I understand that point.

MR. WAYNE: Of course, if I am mistaken as to what the instruction shows, the exception would fall anyhow.

THE COURT: Yes.

MR. AILSHIE: I want to take one; it simply relates back to our motion for an instructed verdict, but I want to except to that portion of the Court's instruction in which he defined the exception to the rule of the assumption of risk. The defendant excepts to that part for the reason that the exception to the rule is not applicable to the facts in this case, and that it was error and prejudicial to the defendant to instruct the jury with reference to the exception to that rule.

THE COURT: Yes.

THE COURT: I will not recall the jury: I think the instructions I gave convey my views of the law.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff,

vs.

THE GOLD HUNTER MINING & SMELTING
COMPANY,

Defendant.

VERDICT.

We, the jury in the above entitled action, find for the plaintiff and assess the damages at the sum of \$10,000.

(Signed.)

C. D. WARNER,
Foreman.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the Judge who presided in said court at the trial of the case of Edward Johnson vs. Gold Hunter Mining & Smelting Company, tried in said court on the 1st day of June, A. D. 1915, and ending on said day, do hereby certify that the foregoing Bill of Exceptions was handed me by the Clerk of the Court on the 14th day of August, A. D. 1915, for settlement and it appearing to me that the same has been within the time allowed by law, and within the time allowed by an order of this court extending such time, served upon the attorneys for the plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement, and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct

and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified and the instructions given by the court herewith and all the exceptions taken by the defendant to the admission of testimony and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct Bill of Exceptions in this cause, and I hereby certify that the same with the exhibits separately certified be made a part hereof contains all of the evidence produced at the trial. The Clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions.

Dated at Boise, Idaho, this 14th day of August, A. D. 1915.

FRANK S. DIETRICH,
Judge.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,
vs.
GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

NOTICE.

To Edward Johnson, plaintiff, and to Messrs. John P. Gray and Walter H. Hanson, attorneys for plaintiff:

You and each of you will please take notice that the foregoing bill of exceptions, complete in 147

pages, will be presented to the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, for settlement as a full, true and correct bill of exceptions in this case.

JAMES A. WAYNE,
J. F. AILSHIE,
Attorneys for Defendant.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

Service of the defendant's proposed Bill of Exceptions in the above entitled action is hereby accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 28th day of July, A. D. 1915.

JOHN P. GRAY,
Residence and Postoffice Address,
Coeur d'Alene, Idaho;

WALTER H. HANSON,
Residence and Postoffice Address,
Wallace, Idaho;

Attorneys for Plaintiff.

Endorsed: Filed August 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled action, acting through their respective counsel, that the defendant herein, Gold Hunter Mining & Smelting Company, may have thirty (30) days extension of time from and after the 30th day of June, A. D. 1915, within which to obtain a writ or error in the above entitled cause and within which to file a bond superseding the judgment in said cause; and that said defendant may have a stay of proceedings and a stay of execution during said time.

Dated this 23rd day of June, A. D. 1915.

JOHN P. GRAY,

WALTER H. HANSON,

Attorneys for Plaintiff.

JAMES A. WAYNE,

J. F. AILSHIE,

Attorneys for Defendant.

Approved: Dietrich, Judge. June 28, 1915.

Endorsed: Filed June 28, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

PETITION FOR WRIT OF ERROR.

Comes now Gold Hunter Mining & Smelting Company, a corporation, defendant herein, and says that on or about the 1st day of June, 1915, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, This defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. F. AILSHIE,

Residence and Postoffice Address,
Coeur d'Alene, Idaho;

JAMES A. WAYNE,

Residence and Postoffice Address,
Wallace, Idaho;

Attorneys for Defendant.

Endorsed: Filed July 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

ASSIGNMENTS OF ERROR.

I.

The court erred in denying defendant's motion for a directed verdict and in refusing to instruct the jury to return a verdict in favor of the defendant at the close of the evidence, for the following reasons, to-wit:

(a) Because it appeared from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint, and in this case.

(b) Because it appeared by the evidence that said plaintiff knew and appreciated the risk to which he was subjected at the time of his injury, and that plaintiff therefore assumed such risks, and that his injury resulted from an assumed risk.

(c) Because it appeared by the evidence that the plaintiff at the time of his injury was guilty of contributory negligence in passing along a way which he knew to be defective and dangerous, and that plaintiff's injury resulted from his own contributory negligence.

(d) Because it appeared from the evidence that if the place where the plaintiff was injured was un-

safe, that such place had been rendered unsafe by the act of a fellow servant.

(e) Because it appeared from plaintiff's complaint and the evidence adduced in this case that the only act of negligence charged against this defendant was the failure to repair a ladder between the second and third floors, and that such failure on the part of the defendant was not the proximate cause of the plaintiff's injury.

(f) Because it appears that the plaintiff was injured while passing along an unsafe way which he had adopted, uninfluenced by any act of the defendant rather than to pass along a safe way which had been provided by the defendant, and was therefore guilty of contributory negligence at the time of his injury.

II.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 1, which was as follows, to-wit:

"I instruct you that where a person injured seeks to recover on the ground that the employer has promised to repair, he must show that in doing what he did or subjecting himself to the danger that he could not foresee or anticipate the injury and that there was no other reasonable or equally safe way of going than the way he went. And if you should believe in this case that there was another way provided, which was the method usually provided in such mines for employees

going from one floor to the other, and that the plaintiff could have gone that way on the night he was injured, then I instruct you that he would not have been justified in taking a more dangerous way if it was not the usual way provided by the employer and that any promise of providing another way would not furnish him a justification for subjecting himself to an additional danger."

III.

The court erred in refusing to instruct the jury as requested by defendant's instruction numbered 2, which was as follows, to-wit:

"An employee who knows and appreciates the hazard of his service and the risk which is apparent to ordinary observation assumes the risk incident to the same, and where the defect is as obvious and well known to the employee as to the employer, the employee assumes the risk thereof as one of the ordinary risks of business or employment. If, in the case now before you, you believe that the defect or danger was one of which the plaintiff knew and appreciated, as well as the employer, then it was such a risk as an employee assumes."

IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

Some of you were upon the jury that tried the last case, and you heard the instructions that

were given then. The principles of law are in a great many respects the same in this case as they were in that. But in some respects there are different features, and some of you were not upon that jury, and hence I shall instruct you fully in this case, and those of you who were in the other case will lay aside any recollection that you may have of what was said in that case.”

To which portion of the said oral charge of the court to the jury, and specifically that portion wherein the court referred to the instructions previously given to another jury, defining negligence and announcing the law with reference to negligence, the defendant by counsel then and there duly objected and excepted for the reason that it was prejudicial to the defendant to have the jury in this case reminded of the case which they had just previously tried, and in which they had just previously rendered a verdict; and the action of the Court in giving the said portion of said instruction is now by this defendant assigned as error.

V.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

“Even though you should find that the defendant was negligent, even though you should find that the plaintiff was not negligent, he might still be debarred from recovering under the rule commonly referred to as the assumption of risk by an employee. I will explain that to you in this way. If one, being in the employ of another,

uses a tool or a piece of machinery which is defective, or works in a place which is dangerous, and he, the employee, knows of the defect or the dangerous condition, and, by reason of his age and intelligence and experience, is able to appreciate the peril of using such defective device or machine, or the peril from such dangerous conditions, in the place where he works, then the general rule is that he impliedly agrees to take the chance, he relieves his employer from that chance. I explained that to you upon the other jury by the use of a very familiar and simple device, and perhaps it is as good an illustration as I can give you now. If one of you, being a farmer, employs a farm hand, and, we will say, puts into his hands an axe or a pitchfork with a cracked handle, and the employee knows nothing about it, and uses the device, ignorant of the weakness of the handle, and is injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, upon placing such axe or pitchfork in the hands of his employee, he calls his attention to it, and the employee is able to appreciate, as is the employer, the danger of using a pitchfork or axe in that condition, then if he goes on and uses it, he can make no complaint if he suffers injury, because he impliedly agrees to take the chance."

To which portion of said oral instructions to the jury, and particularly to that portion of said in-

struction which in effect advised the jury that it was necessary for the employer to call the attention of an employee to the defective condition of an instrument or instrumentality in order to advise the servant of a danger which was patent and obvious, and which advised the jury in effect that the employee did not assume the risk of working with such instrument or instrumentality until he had been so instructed. The defendant by counsel then and there duly objected and excepted for the reason that it was not sufficient that the negligence of the defendant should have contributed to plaintiff's injury, it being necessary that defendant's negligence must have been the proximate cause of plaintiff's injury, which said exception was duly allowed by the court; and which said action of the court in giving the said portion of the said instruction the defendant now assigns as error.

VI.

The court erred in giving the following portion of his oral instruction to the jury, to-wit:

"The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident."

To which portion of the said oral charge to the jury, and specifically that portion wherein the court advised the jury in effect that the plaintiff could recover if the defendant was negligent and such negligence contributed to the plaintiff's injury, the defendant by counsel then and there duly objected and accepted for the reason that it was not sufficient that

the negligence of the defendant should have contributed to plaintiff's injury, it being necessary that defendant's negligence must have been the proximate cause of plaintiff's injury; which said exception was duly allowed by the court and which said action of the court in giving the said portion of the said instruction the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE
IS INSUFFICIENT TO SUSTAIN THE VER-
DICT OF THE JURY AND JUDGMENT
THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence does disclose the fact that a short time prior to plaintiff's accident one of the ladders leading from the third to the second floor of the stope where plaintiff was working had been broken, it does not appear that this condition was known to the defendant, or could have been known by a reasonable inspection, nor does it appear from the evidence that the defective condition of this ladder was the proximate cause of plaintiff's injury, and it does appear from the evidence that there was another safe way known to the plaintiff by which he could safely descend from the third floor to the second floor, and the evidence further discloses that the proximate

cause of plaintiff's injury was the fact that he selected a way of descending from the third to the second floor which he knew or believed to be unsafe and defective, and by which route he was not obliged or required to descend, and which unsafe way had been provided by the act of a fellow servant.

(b) The evidence discloses that the proximate cause of the plaintiff's injury was the negligence of a fellow servant or servants. In this respect the evidence shows that the plank or lagging upon which plaintiff was attempting to cross at the time of his injury was used by the plaintiff and other employees after the ladder between the second and third floors had been broken; the chief witness for the plaintiff (John Holmi) testified that he was first told of the existence of this plank or lagging by either the plaintiff or another of his fellow workmen. In the absence of any proof that this way had been provided by the defendant as a means of going from the third to the second floor, or vice versa, it must be assumed that it was simply a means provided and adopted by the employees themselves as an easy mode of travel between these floors.

(c) The evidence discloses that the plaintiff negligently placed himself in an obviously dangerous position, namely, upon the plank or lagging beneath which there were two open floors; the evidence shows that the plaintiff himself knew or believed this to be a dangerous position; and the evidence further shows that plaintiff need not have placed himself in such position but could have descended by another and safer route; the evidence further shows that what-

ever dangers were attendant upon walking over this inclined plank or lagging were open, obvious and as well known, understood and appreciated by the plaintiff as they could possibly have been by the defendant, and that in choosing and electing to go by such obviously dangerous route the plaintiff was guilty of negligence per se and assumed the risk as a matter of law.

(d) And for the same reason and in the same particulars as mentioned in the foregoing specification (c), the plaintiff was guilty of gross contributory negligence in attempting to pass over said plank or lagging.

Comes now the defendant in this action in connection with its petition for a writ of error and makes, proposes and files the foregoing assignments of error which it avers occurred upon the trial of the said cause, together with its specifications wherein the evidence is insufficient to sustain the verdict or judgment thereon and prays that because thereof, the judgment of the District Court may be reversed.

JAMES A. WAYNE,

J. F. AILSHIE,

Attorneys for Defendant.

Service accepted and copy received July 28, 1915.

JOHN P. GRAY,

Coeur d'Alene, Idaho;

WALTER H. HANSON,

Wallace, Idaho;

Attorneys for Plaintiff.

Endorsed: Filed July 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 14th day of August, 1915, came the defendant by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that the transcript of the record and proceedings and papers upon which the judgment herein is rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had that may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant giving bond according to law in the sum of \$12,000, which shall operate as a supersedeas bond.

Dated this 14th day of August, A. D. 1915.

FRANK S. DIETRICH,
Judge of the United States District Court, for the
District of Idaho.

Endorsed: Filed Aug. 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

BOND ON WRIT OF ERROR.

Know All Men By These Presents, That we, Gold Hunter Mining & Smelting Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of Connecticut, having complied with all the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, Edward Johnson, in the full and just sum of Twelve Thousand (\$12,000) Dollars, to be paid to the said defendant in error, Edward Johnson, his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, A. D. 1915.

Whereas, Lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between Edward Johnson, as plaintiff, and Gold Hunter Mining & Smelting Company, a corporation, as defend-

ant, a judgment was rendered against the said Gold Hunter Mining & Smelting Company, upon a verdict of the jury in the sum of Ten Thousand (\$10,000.00) Dollars, and costs amounting to the sum of \$129.15;

And Whereas, The said defendant, Gold Hunter Mining & Smelting Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiff, Edward Johnson, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California;

Now, The condition of the above obligation is such, that, if the said Gold Hunter Mining & Smelting Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and is a supersedeas bond.

THE AETNA ACCIDENT AND LIABILITY
COMPANY.

By HERMAN J. ROSSI,
(Seal) Resident Vice-President.

Attest: Walter H. Hanson, Resident Assistant
Secretary.

The foregoing bond is hereby approved this 14th day of August, A. D. 1915, and the same when filed

shall operate as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH, Judge.

Endorsed: Filed August 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON, Plaintiff,

vs.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

PRAECIPE FOR TRANSCRIPT.

To Mr. A. L. Richardson,
Clerk of the United States District Court,
Boise, Idaho.

Dear Sir:

You will please prepare transcript in the above entitled cause and please include therein:

1. Writ of Error and Citation, Appeal Bond, Assignments of Error and all other papers relating to this appeal.

2. Judgment Roll.

3. Bill of Exceptions.

4. Copy of Journal Entries.

And in the Judgment Roll you will please include:

1. Complaint.

2. Demurrer to Complaint.

3. Amended Complaint.

4. Answer.

5. Amendment to Answer.
6. Verdict.
7. Judgment.

J. F. AILSHIE,
Residence and Postoffice Address,
Coeur d'Alene, Idaho;
JAMES A. WAYNE,
Residence and Postoffice Address,
Wallace, Idaho;
Attorneys for Defendant.

Endorsed: Filed July 30. 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

EDWARD JOHNSON, Plaintiff,
vs.
GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

WRIT OF ERROR.

The United States of America,
Ninth Judicial District Circuit,—ss.

*The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the District of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Edward Johnson, plaintiff, and Gold Hunter Mining & Smelting Company, a corporation, de-

fendant, a manifest error hath happened, to the great damage of the said Gold Hunter Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 4th day of October next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 2nd day of Sept., A. D. 1915, and in the (139) one hundred and thirty-ninth year of the Independence of the United States of America.

Allowed by: FRANK S. DIETRICH,
(Seal) United States District Judge.

Attest: A. L. Richardson, Clerk of the District Court of the United States, District of Idaho. By Pearl E. Zanger, Deputy.

Endorsed: Filed Sept. 2, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

EDWARD JOHNSON, Plaintiff,

VS.

GOLD HUNTER MINING & SMELTING COM-
PANY, Defendant.

CITATION ON WRIT OF ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

To Edward Johnson, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 4th day of October next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Gold Hunter Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, District Judge of the United States District Court at Boise, Idaho, within said Circuit, this 2nd day of Sept., in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the

United States of America the one hundred and thirty-ninth.

FRANK S. DIETRICH,
United States District Judge.

We hereby, this 18th day of August, 1915, accept personal service of this citation on behalf of Edward Johnson, Appellee.

JOHN P. GRAY,
WALTER H. HANSON,
Attorneys for Appellee.

Endorsed: Filed Sept. 2, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: A. L. RICHARDSON, Clerk.

By PEARL E. ZANGER, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

EDWARD JOHNSON,

Plaintiff, and Defendant in Error,
vs.

GOLD HUNTER MINING & SMELTING COMPANY,

Defendant, and Plaintiff in Error.

CLERK'S CERTIFICATE.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 212, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$359.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said court this 2nd day of October, 1915.

A. L. RICHARDSON, Clerk.

By PEARL E. ZANGER, Deputy Clerk.